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Supreme Court of the United States

OCTOBER TERM, 1947.

19543

Sup. Ct.

No. 79.

THE UNITED STATES OF AMERICA, *Appellant*,

vs.

PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, *et al.*

No. 80.

LOEW'S INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., *et al.*, *Appellants*,

vs.

THE UNITED STATES OF AMERICA.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF OF THE WARNER DEFENDANTS.

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BRIEF OF THE WARNER DEFENDANTS.

Opinion Below.

The main opinion below is reported in 66 F. Supp. 323, and the findings, decree and memo. thereon in 70 F. Supp. 53.

Jurisdiction.

Jurisdiction of this Court to review by direct appeal the judgment and decree entered in this case is conferred by Section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823; 36 Stat. 1167; 58 Stat. 572; 15 USC, Sec. 29), and Section 238

of the Judicial Code, as amended (36 Stat. 1157; 38 Stat. 804; 43 Stat. 938; 28 USC, Sec. 345).

Probable jurisdiction was noted by this Court on June 23, 1947.

The Appeals.

Cross appeals (on a record consolidated by stipulation, R. 3823) by plaintiff and each of the defendants from a judgment of a statutory court for the Southern District of New York (Augustus Hand, *Ct. J.*, Goddard and Bright, *Dt. JJ.*) in an action under the Sherman Act for injunctive relief against certain allegedly illegal trade practices and against ownership or operation of motion picture theatres by the five theatre owning or operating defendants, *i. e.*, Paramount, Fox, Loew's, RKO and Warner. Warner's petition for appeal is found at R. 3726. The other petitions for appeal are at R. 3726, 3738, 3751, 3766, 3788.

This is primarily a respondent's brief.

Since Warner appellants' arguments involve practices common to the industry as a whole, therefore the convenience of this Court may best be served by simple cross-references here to pertinent arguments in such other briefs as it has been our privilege to read. Such cross-references are found in connection with the specifications of error which follow.

By our failure to repeat pertinent arguments in this brief, we do not waive any assignment of error.

Specification of Assigned Errors to Be Urged.

Our specifications of error are:

1.) The injunction against theatre expansion in the Decree, III (6) [R. 3700] (Error no. 30, R. 3735) and the failure to modify said injunction so as to permit such expansion if the Court shall first find that such acquisition will not unduly restrain competition in exhibition (Error no. 31, R. 3735). See Point Second of Twentieth Century-Fox Brief; Point I of RKO Brief; and Point I (h) of this Brief, p. 31, *infra.*

2.) The injunction against part ownership of theatres or an interest therein in the Decree, III (5) [R. 3699] (Errors nos. 29, 33, R. 3734), and the findings and conclusions on which it is based (Errors nos. 25-27, R. 3733). See Point First of Twentieth Century-Fox Brief; Point II of RKO Brief; and Point I, (g) (2) of this Brief, p. 26, *infra.*

3.) The termination of the arbitration proceeding and machinery as in V of the Decree provided [R. 3700] (Error no. 34, R. 3736) and the failure to provide for arbitration of disputes (Error no. 35, R. 3736). See Point Third of Twentieth Century-Fox Brief.

4.) The injunction against granting any license in which minimum prices for admission to a theatre are fixed by the parties in the Decree, II (1) [R. 3695] (Error no. 1, R. 3728), and the findings and conclusions on which it is based relating to fixing of minimum admission prices (Errors nos. 2-5, 8, 10, 13-14,

22, 37-38; R. 3729, *et seq.*) and relating to price-fixing (Errors, nos. 6, 8-12, 20, 37-38; R. 3729, *et seq.*). See Points III and IV of RKO Brief and Point IV of Loew's Brief.

5.) The injunction "from agreeing with each other or with any exhibitors or distributors to maintain a system of clearances" in the Decree, II (2) [R. 3695] (Error no. 18, R. 3732) and the provision that "Whenever any clearance provision is attacked as not legal under the provisions of this decree, the burden shall be upon the distributor to sustain the legality thereof" [R. 3696] (Error no. 19, R. 3732), and the findings and conclusions on which they are based relating to a system of clearance and run (Errors nos. 15-18, 20-22, 37-38; R. 3731, *et seq.*). See Loew's Brief, Point IV and Point V of this Brief, p. 123, *infra*.

6.) The finding that various contract provisions set forth in finding no. 110 (R. 3681) discriminated in favor of large circuits and against small independent exhibitors (Error no. 23, R. 3733) and the conclusion of law no. 8 (d) [R. 3692], based thereon that this was a violation of the Sherman Act (Error no. 24, R. 3733).

7.) The failure to grant the Warner defendants' motion to modify conclusion of law no. 9 (d) [R. 3693] by limiting it to the "discriminatory license privileges as found in Finding No. 110 above" (Error no. 32, R. 3735), and the holding in said conclusion insofar as it may be broader (Error no. 22, R. 3733).

8.) The denial and failure to grant the Warner de-

fendants' motions to strike exhibits and evidence upon the grounds set forth in Error no. 36, R. 3736.

9.) The finding and conclusion that the Warner defendants or any of them violated the Sherman Act in any of the respects hereinabove assigned as error (Error no. 38, R. 3736).

10.) The injunction against continuing to perform existing "pooling" agreements as defined in the Decree, III (2) [R. 3698] (Error no. 28, R. 3734). See Point I (g) (1) of this Brief, p. 25, *infra*.

Short description of the Warner companies.

The brothers Warner started in this business as exhibitors of motion pictures (R. 1553). In 1906 the brothers Warner operated a theatre (R. 1553). Subsequently, they went into the business of distributing motion pictures (R. 1553). By 1916 they were in the business of producing pictures, distributing pictures and operating a few theatres (R. 1553). This business was incorporated in 1923 as Warner Bros. Pictures, Inc. (Finding 25, R. 3665). This company successfully pioneered the development of the talking motion picture (Finding 26, R. 3665). By 1928 it became necessary rapidly to acquire a large number of theatres in order to have those talking pictures exhibited (R. 1555). The minimum cost of installing talking equipment in theatres at that time was $25,000, and very few theatre owners were willing to make such investment on such a gamble (R. 1555). The initial acquisition of Warner was the Stanley Company of America, with 250 theatres situated prin-

cipally in and around Pennsylvania and New Jersey. This transaction, consummated late in 1928, gave Warner 250 theatres which could be immediately equipped with sound installation (Findings 27-29, R. 3665). Warner acquired several other circuits of theatres, and by 1931 had an interest in 591 theatres (Findings 30-31, R. 3665).

Since 1931 there has been no policy by Warner for the expansion of theatre holdings (R. 1557, 1826).

Today the Warner companies have an interest in 547 theatres, a net reduction of 44 from its peak holdings in 1931 (Finding 32, R. 3665).

During this same period the total number of theatres in the U. S. grew from 13,386 in 1935 to 18,076 in 1945 (Finding 145, R. 3688).

Warner as an exhibitor now operates less than 3% of all of the theatres in the United States (Finding 118, R. 3684).

Warner, as a producer and distributor, produces and distributes approximately 19 pictures a year, or less than 5% of the total pictures produced and distributed in the United States (Finding 99, R. 3677).

30% of the revenue received from the licensing of these pictures came from the foreign market. The Court found (R. 3687):

> "139. Of its total domestic and foreign rentals Warner received about 30% from abroad, about 43% from theatres in which none of the defendants had an interest, about 10% from Warner's own American theatres, and the balance, about

16%, from American theatres in which one or more of the defendants had an interest."

As to the domestic revenue, the court found that (R. 3687):

"138. In the 4 pre-war seasons of 1937-1940, Warner derived about 61 6/10% of its domestic gross rentals from theatres not affiliated with any of the defendants, about 14% from theatres in which it had an interest, about 4% from theatres in which Twentieth Century-Fox had an interest, about 6% from theatres in which RKO had an interest, and less than 1% from theatres in which Loew had an interest."

Effect of decree below.

The effect of the judgment below may prevent five defendants from owning or operating 1,292 theatres presently partially owned by any of the five of them, the court having found such partial ownerships to be in restraint of trade (Finding 117, R. 3683). It, moreover, enjoined each of them from further expanding its theatre holdings, although Warner had had no policy of expanding its theatre holdings in the last 17 years.

It also decreed injunctions against the trade practices held to be illegal, and directed competitive bidding as an additional remedy against defendants' tendency to favor "old customers", but retained jurisdiction to decree different remedies, should the remedies directed prove inadequate (as in *United States* v. *National Lead Co.*, 332 U. S. 319; and in *International Salt Co.* v. *United States*, No. 46, this Term).

2) That the courts lack ingenuity to fashion adequate relief short of amputation even by and after a pragmatic test of remedies ordered (Pltff.'s Br., Point I, B);

3) That "extensive experience" shows that any adequate relief short of amputation must be ineffective, and that the courts will be helpless to deal with inevitable violations when they occur (Pltff.'s Br., Point I, C);

4) That amputation is a necessary and inevitable remedy where Warner's 3% of this nation's theatres pay approximately 8% of the total film rentals paid to all of the distributor defendants and collect approximately 6% of the total dollars paid at the box offices for admission to the nation's theatres (Pltff.'s Br., Point II, A);

5) That the prospective injury to the public by the relief of amputation (or its equivalent of an injunction against so-called cross-licensing [Pltff.'s Br., Point III]) is a factor which may not influence the exercise of discretion as to the form and extent of relief (Pltff.'s Br., Point II, C).

Our position.

Each of these assumptions and arguments will be answered in detail in the Points that follow.

Our position is simply:

1.) That no arithmetic computations are substitutes for a finding of conspiracy to monopolize;

2.) That no finding of conspiracy to restrain relating to trade practices is a substitute for a

finding of conspiracy to monopolize, when the only relief sought is amputation;

3.) That on the findings (and the supporting evidence) here there is no basis for amputation, either from the conspiracy found or the alleged effect thereof; and

4.) That the remedies prescribed below are so far-reaching in their probable effect on the entire industry as to preclude the possibility of a holding that the statutory court abused discretion in directing a pragmatic test of its remedies.

POINT I.

The decree destroys the trade practices found illegal. These trade practices are wholly unrelated to integration, making it impossible for this Court to hold that divorcement, which the Court below found would be "injurious to the corporations concerned and damaging to the public", is required.

Nature of Alleged Illegalities.

The Court found: "The illegalities and restraints herein found are not in the ownership of many or most of the best theatres by the producer-distributors, but in" the trade practices held to be in restraint of trade (Finding 154, R. 3690).

"Total divestiture would not remedy the * * * practices which have been found unreasonably to restrict competition" (Finding 156, R. 3690).

"Total divestiture would be injurious to the corporations concerned and would be damaging to the public" (Finding 155, R. 3690).

The Court then proceeded to strike at the very root of these trade practices and decreed basic and drastic changes in the method of distributing motion pictures.

It decided that divestiture would not cure the evils which the Court found (Finding 154, R. 3690):

> "The illegalities and restraint herein found, are not in the ownership of many or most of the best theatres by the producer-distributors, but in admission price-fixing, non-competitive granting of runs and clearances, unreasonable clearances, formula deals, master agreements, franchises, block-booking, pooling agreements and certain discriminations among licensees between defendants and independents. These practices, if employed in the future, in favor of powerful independents would effect all of the undesirable results that have existed when the five exhibitor defendants and their subsidiaries have owned or controlled numerous theatres in which the defendants' pictures have been exhibited."

On the basis of this finding it squarely enjoined every one of these trade practices.

To make assurance doubly sure, it did two other things:

a) Required a system of competitive bidding which would further make these trade practices impossible and would tend to make more fluid the distribution of features; and

b) reserved jurisdiction to follow up, on the basis of the experience in this complicated industry, the effectuation of its purpose to abolish these practices and to render distribution more fluid.

The Court will note in the following discussion of these trade practices:

a) Their origin ante-dated theatre ownership by Warner and were common throughout the industry;

b) Warner did not impose illegal trade practices on the industry; and

c) Thus the Court was abundantly right in holding that there was no basis in these practices for an inference of combination or conspiracy to monopolize the exhibition business, or for a finding that the theatre-owning defendants had monopolized the exhibition business.

It appropriately defined the illegalities and required the entire industry to change basically and drastically its trade practices which we now take up seriatim.

(a) Block booking enjoined.

Block-booking, the licensing of a season's product (Finding 1, R. 3659), is a practice older than the feature motion picture. Indeed, the complaint alleges that the practice existed "in the early stages of motion picture distribution" before the feature was first produced (Par. 106, R. 3170).

It was held valid in 1932 by the Second Circuit Court of Appeals (Augustus N. Hand, *Ct. J.*, par-

ticipating) in *Federal Trade Com'n. v. Paramount Famous-Lasky Corp.*, 57 F. (2d) 152).

It was held illegal below (Decree II, 7, R. 3696) "particularly because of recent decisions of the Supreme Court" (66 F. Supp. at 349 [R. 3545]), which we claim were improperly applied to the facts of this case.

The five defendants who signed the consent decree of 1940 have since licensed in blocks of no more than five features (66 F. Supp. at 348 [R. 3543]; see also R. 2753).

Most producers who had no theatres continued, however, to block-book (R. 2717).

Warner discontinued the practice entirely soon after said consent decree, voluntarily selling feature by feature (R. 1504).

The practice did not flow from a producer's ownership of theatres, but from the desire of any theatre owner to be assured of continuity of product. This is a natural inference from plaintiff's counsel's statement (R. 2754): "I concede that as far as exhibitors are concerned, many of them, or perhaps most of them, want the security that comes from having as many pictures as they can, tied up with a maximum privilege of elimination."

Obviously, this allegedly illegal restraint is not related to theatre ownership, did not grow out of theatre ownership, and was not an intentional violation of the Act.

Finally, in any event, whatever the illegality of the practice or its effect, it has been made academic as a result of the injunction below (Decree II, 7, R. 3696).

(b) Formula deals, master agreements and franchises enjoined.

These practices are defined in the footnote.*

The Court found that (Finding 87, R. 3675):

> "Loew's is not, and never has been, a party either as a distributor or as an exhibitor, to any 'formula deal' license agreements".

Moreover, the Court found that only Paramount and RKO had as distributors made formula deals (Finding 86, R. 3675; Conclusion 8 [h], R. 3693).

It is thus obvious that such deals had no relation to integration.

Similarly franchises (licenses for more than a year's product) had no relation to integration. There is no evidence which limits franchises to the theatre

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* Formula deal defined (Finding 1, R. 3660):

> "A licensing agreement with a circuit of theatres in which the license fee of a given feature is measured for the theatres covered by the agreement by a specified percentage of the feature's national gross."

Master agreement defined (Finding 1, R. 3660):

> "A licensing agreement, also known as a 'blanket deal', covering the exhibition of features in a number of theatres, usually comprising a circuit."

Franchise defined (Finding 1, R. 3660):

> "A licensing agreement, or series of licensing agreements, entered into as a part of the same transaction, in effect for more than one motion picture season and covering the exhibition of features released by one distributor during the entire period of the agreement."

owning defendants; the evidence is to the contrary. The amended complaint itself alleges that long-term franchises were made with both unaffiliated and affiliated circuits (Par. 121, R. 3176), and the opinion below recognized that divestiture would not remedy the alleged evil as to the many independent circuits (Finding 154, R. 3690; 66 F. Supp. at 355 [R. 3555]) such as the Schine circuit which the amended complaint alleges to have come into being when after 1929 Universal divested itself of its theatres (Par. 78, R. 3163).

That franchises have no relation to integration appears further from the fact that whenever a distributor, affiliated or not affiliated, granted franchises, it granted those to both affiliated and non-affiliated theatres, and when a distributor discontinued its practice of granting franchises it discontinued as to both affiliated and non-affiliated theatres. Thus, the Court found that "Fox has not granted any franchises since June 6, 1940" (Finding 91, R. 3675), that "Loew's is not currently granting franchises" (Finding 90, R. 3675), and that most of the franchises were granted to independents, by Loew's during its entire history (Finding 90), by Universal during the period in question (Finding 92, R. 3676), and by Fox in 1938-39, the season in which it had most franchises outstanding (Finding 91, R. 3675). Plaintiff offered no evidence that Warner had granted any franchises which existed at the time of the trial.

That the making of franchises could not have been an intentional violation of the Act is conclusively established by the fact that plaintiff insisted, as late as 1936, that 10-year franchises be granted in St.

Louis as a condition to discontinuance of a local suit by plaintiff in equity under the Act (R. 936-937).

Master agreements were found to "allow the exhibitor to allocate the film rental paid among the theatres as it sees fit and also to exhibit the features upon such playing time as it deems best and leaves other terms to the circuit's discretion" and therefore held to be unreasonable restraints (Finding 88, R. 3675). They are patently not related to integration. Not even the harsh and destructive divestiture sought would remedy the alleged evil as to the many independent circuits (Finding 154, R. 3690; 66 F. Supp. at 355 [R. 3554-3555]).

In any event, any illegality or restraint arising from the misuse of combined purchasing power of several theatres is not something arising out of theatre ownership by a producer-distributor, but out of misuse by anybody of more than a single theatre.

Formula deals and master agreements were not condemned *per se* in the *Crescent* (323 U. S. 173) or *Interstate* (306 U. S. 208) cases. If they have now become illegal, they can hardly be condemned as evidence of intentional violation of the Act.

But whatever the legality of such agreements or their effect, they have now become academic as a result of the specific injunctions below (Decree, II, 5 and 6, R. 3696) and the additional requirement of the decree that each theatre must bid separately for each feature (Decree, II, 8, d, R. 3698).

(c) Unreasonable clearance enjoined.

That clearance is a practice as old as the feature motion picture* is alleged in the amended complaint (Par. 114, R. 3173):

> "Prior to the advent of the feature picture, films were licensed generally on the basis of age * * *. There was evolved during this period the concept of 'run' * * *. From about 1915 or 1916 * * * exhibitors * * * sought to obtain and frequently did obtain long periods of protection [later called clearance] over all other theatres in the city and surrounding territory where they were located.
>
> 115. From about 1915 to about 1931 it was frankly conceded by distributors and exhibitors generally that uniform runs and clearances were desirable * * *."

The beneficial effect of clearance or a license for successive dates to the public was found by the Court (R. 3673):

> "76. Either a license for successive dates, or one providing for clearance, permits the public to see the picture in a later exhibiting theatre at lower than prior rates.
>
> "77. A grant of clearance, when not accompanied by a fixing of minimum admission prices or not unduly extended as to area or duration affords a fair protection of the interest of the licensor in the rental to be derived from the exhibition of the feature licensed, without unreasonably interfering with the interest of the public."

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* See also R. 1080-1081, 1894-1895, Ex. P-5, part of which is printed on page 22 of plaintiff's Appendix.

In the Consent Decree plaintiff recognized clearance as "essential" if reasonable as to time and area (66 F. Supp. at 342 [R. 3531]). Indeed, plaintiff's brief on a motion to modify the consent decree so as to extend the scope of arbitration and to effect total divestiture of theatres, filed only 8 months before the trial, recognized that "reasonable" clearance does not violate the Act under decisions of this Court (R. 3423):

> "As the agreement is one which restrains interstate commerce in films it is a violation of Section I of the Sherman Act unless the restraint is a *reasonable one. Interstate Circuit v. United States*, 306 U. S. 209." (Italics by plaintiff's counsel.)

Divestiture of theatre ownership would not solve the problem of whether any particular clearance was or was not reasonable. That, as the Court pointed out, "should be left to local suits in the area concerned, or, even more appropriately, to litigation before an Arbitration Board composed of men versed in the complexities of this industry" (66 F. Supp. at 342 [R. 3533]).

The Court below wrote "we cannot find sufficient evidence to support an inference that the major defendants * * * have either collectively or severally entered upon a general policy of discriminating against independents in their grants of clearances" (66 F. Supp. at 342 [R. 3532]). There is nothing to support an inference that, but for theatre ownership by producer-distributors, the clearances would have been different from what they were.

The history of this case shows that the theatre-owning defendants did not intend to use unreasonable clearance as an attempt to monopolize. By the Consent Decree, they consented to have the clearances of their own theatres and of the clearances which they granted independent theatres reviewed and fixed by disinterested parties. On the trial, they offered to continue arbitration of clearance and to extend it to run. They repeat that offer here.

The Court below held existing clearance practices illegal solely because defendants had "acquiesced in and forwarded a uniform system of clearances" (66 F. Supp. at 342 [R. 3532]) and enjoined such uniformity.

If such uniformity be illegal, it was not due to theatre ownership by a producing defendant.

It was due to the *insistence* by the owner of the theatre—independent or defendant alike—that each of the distributors *grant the longest period of clearance which any one of the distributors was willing to grant the theatre owner*—independent or defendant alike.

Competition, not conspiracy, was the cause of uniformity.

Such uniformity has no relation whatsoever to integration.

Divestiture of theatres from distributors could not, however, affect this tendency toward uniform pressure on distributors, even though they owned no theatres as in the case of Universal, Columbia, United Artists,

or such other distributors as were not made parties defendant.

However, to the extent that uniformity may have been the result of conspiracy, it has been rectified by injunction (Decree, II, 2-4, R. 3695).

(d) Admission price-fixing enjoined.

The practice of inserting a minimum admission price restriction in each license dates back to the origin of feature motion pictures (R. 717, 917, Ex. P-6) and was believed justified by the Copyright Law.*

The uniformity of such restrictions by each defendant as to any particular theatre was the result, as defendants contended, merely of inserting in the license the price actually charged by the exhibitor. As plaintiff's counsel stated, "the testimony * * * is that

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* Plaintiff's brief (on a motion to amend the consent decree by extending the scope of arbitration and to effect total divestiture) recognized this in discussing provisions for minimum admission prices, clearance and run (R. 3423):

> "Clearance restrictions have *traditionally* been imposed by distributors in this industry on the theory that their ownership of copyrights on the films distributed entitled them to impose such restrictions on the exhibition of the films in theatres as are necessary and appropriate to realize maximum revenue from the exploitation of the copyright. Upon this theory, distributors have customarily undertaken to fix the minimum admission prices at which their films should be exhibited to the public in all of the theatres they license * * * *Obviously* the first-run exhibitors would not ordinarily be expected to pay film rentals based upon the receipt of the highest admission price in a competitive area unless there were some assurance that the films they exhibited would not be exhibited elsewhere in the area at substantially lower prices until after the lapse of some reasonable period of time." (Italics ours.)

Holdings below.

Apart from certain industry-wide trade practices, all of which antedated Warner's theatre acquisitions, the Court below completely acquitted us of charges of basic conspiracy or combination to monopolize. It found (R. 3689-3690):

"Finding 152. There is no substantial proof that any of the corporate defendants was organized or has been maintained for the purpose of achieving a national monopoly either in production, distribution, or exhibition of motion pictures, except as found in findings 153 and 154 below.

"Finding 153. In localities where there is ownership by a single defendant of all the first-run theatres, there is no sufficient proof that it has been for the purpose of creating a monopoly and has not rather arisen from the inertness of the competitors, their lack of financial ability to build theatres comparable to those of the defendants, or from the preference of the public for the best equipped houses and not from 'inherent vice' on the part of these defendants.

"Finding 154. The illegalities and restraints herein found, are not in the ownership of many or most of the best theatres by the producer-distributors, but in admission price-fixing, non-competitive granting of runs and clearances, unreasonable clearances, formula deals, master agreements, franchises, block-booking, pooling agreements and certain discriminations among licensees between defendants and independents. * * *"

It further found (R. 3690):

> "Finding 155. Total divestiture would be injurious to the corporations concerned and would be damaging to the public."

It adjudged us guilty only of industry-wide trade practices set forth in this finding 154. We shall show

a) that every one of these industry-wide trade practices was utterly uprooted by the decree below;

b) that every one of these industry-wide trade practices was wholly unrelated to and not caused by theatre ownership by producer-distributors, or integration, and therefore

c) that the Government's claim that this industry should be destroyed by divorcement is baseless both in fact and in law.

Comment on plaintiff's brief.

Plaintiff's brief is essentially based on the following fallacious assumptions and arguments:

1) That amputation is a necessary and inevitable remedy for any concerted violation of the Act, even though "There is no substantial proof that any of the corporate defendants was organized or has been maintained for the purpose of achieving a national monopoly either in production, distribution or exhibition" (Finding 152, R. 3689) and even though they "cannot be treated collectively so as to establish claims of general monopolization in exhibition" (66 F. Supp. at 354 [R. 3553] (Pltff.'s Br., Point I, A);

the distributor merely inserts the going admission price of the exhibitor or a price suggested by the exhibitor" (R. 2583) and the Court found (R. 3670):

> "63. The minimum admission prices included in licenses of each of the eight distributor-defendants for any given theatre are in general uniform, being the usual admission prices currently charged by the exhibitor."

Any uniformity in such price restrictions obviously arose in the same way as in the case of uniform clearance, *i. e., out of the acceptance by the distributor of the exhibitor's price which by the exhibitor's own choice was the same for all pictures which he exhibited.*

Any uniformity in this negligible area* was not the result of an intentional violation of the Act, even if its effect should now be held illegal.

The appropriate remedy is a simple injunction against such price-fixing, not divestiture.

The prices were not fixed *because* theatres were owned. They were fixed in what may have been a mistaken belief that the owner of a copyrighted feature

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* There was no evidence that the minimum admission prices sometimes specified in Warner licenses did in fact hamper any exhibitor in his free choice of the admission price which any exhibitor chose to charge for the exhibition of a Warner feature.

The only evidence (Exhibit W-22, summarized in a footnote on p. 108, *infra*) showed marked variations of the actual admission prices charged from the minimum admission prices sometimes stipulated in Warner licenses.

There is no evidence whatsoever that any exhibitor was threatened or coerced for such variations from the stipulated minimum, or that the sanctions in some of the licenses against violation of the stipulated minimums were ever enforced.

had such a right when the minimum price restriction was not for some ulterior purpose. That such a provision was not an intentional violation of the Act and that such a belief might well have been held is inescapable from the *Interstate* case (306 U. S. 208) where the type of price restriction there used was condemned solely because used for ulterior purposes.

In any event, such price-fixing will become academic by the injunction below (Decree, II, 1, R. 3695).

(e) Discrimination among licensees.

The Court below stated (R. 3550) that provisions most frequently found in franchises and master agreements made with the larger circuits, affiliated or unaffiliated, accorded these circuits certain advantages over the small independents (66 F. Supp. at 352 [R. 3550]). It was careful to add (66 F. Supp. at 353 [R. 3551]):

> "The foregoing is not to be construed, however, as indicating that the distributor-defendants have discriminated among their licensees with respect to film rentals, clearances, or minimum admission prices."

What in effect it held was that the small independent exhibitor suffered certain contractual disadvantages as against the circuits, either affiliated or nonaffiliated.

It may fairly be questioned whether any such discrimination, based on purely business considerations, and not tending to unreasonable restraint and monopoly, was in any sense a violation of the Sherman Law.

But assuming *arguendo* that it was, the injunction against franchises and master agreements destroyed any such discrimination.

Surely, such discrimination was not inherent in theatre ownership by producing companies or even in the ownership of a circuit of theatres.

And surely there is no reasonable answer to the position taken by the Court below that, by the abolition of formula deals, master agreements and franchises and under the new selling system decreed, these discriminations have become academic. In the words of the opinion below (66 F. Supp. at 353 [R. 3551]):

> "* * * we believe will not exist in future licenses under the bidding system for which we are providing."

(f) Remedy as to runs.

The Court below sought to decree some remedy more specifically directed against that portion of the "fixed scale of clearances, runs and admission prices" which related to runs, in order to promote freer bargaining (Finding 84, R. 3674).

In its opinion, it had indicated that the plaintiff's suggestion of competitive bidding (R. 2556) was a proper solution, in one sentence over-stating that such bidding was "the only way competition may be introduced into the present system" (R. 3540).

After hearing the protests of *amici* and plaintiff's shift of position so as to approve competitive licensing only as between independents and then in some

more general form, the Court carefully omitted the word "only" in its findings of fact (R. 3674):

> "85. Competition can be introduced into the present system of fixed admission prices, clearances, and runs, by requiring" licenses to be granted "to the highest bidder."

and inserting supplementary injunctive provisions in its decree to accomplish that result.

II (9) enjoined defendants (R. 3698):

> "From arbitrarily refusing the demand of an [independent] exhibitor, who operates a theatre in competition with another [independent] theatre * * * to license a feature to him for exhibition on a run selected by the exhibitor * * *"

and II (8) of the Decree (R. 3696) required competitive bidding limited to whoever desires such an opportunity in a competitive area (R. 3702):

This additional remedy directed to so much of the system as related to runs is fully considered in Point II (p. 41, *infra*).

(g) In the two instances where the court below found restraints in the exhibition business, not related to integration ("pools" and joint ownership of theatres), more than adequate relief was granted.

(1) *Joint operation ("Pools") enjoined.*

The Court found that in those instances in which the exhibitor defendants pooled their theatres with those of other exhibitors, the result was to eliminate competition between those theatres in such situations. The Court directed the termination of all such pooling agreements and enjoined the making of any others (Decree, III, 2-4, R. 3698).

Compared with the total number of theatres and competitive situations in this country, Warner was in a negligible number of "pools". These "pools", now terminated, were only 22 in number,* of which four involved Warner and a defendant; one Warner, a defendant and an independent; and seventeen Warner and an independent. Only 9 of these pools involved any first run theatres in the 92 largest cities.

As a result of the decree below, all 22 Warner "Pools" have been terminated and the injunction against their revivor, not assigned as error by Warner,** renders the whole subject academic.

"Pools" obviously had no relation to integration, since theatre owners have "pooled" their theatres from time immemorial, regardless of whether they produced or distributed pictures or plays.

(2) *Partial ownership of theatres enjoined.*

The Court found that many theatres were held jointly by an exhibitor defendant together with another exhibitor and that in those situations the "de-

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* We have no means of ascertaining the total number of pools in the country. Page 255 of plaintiff's appendix lists the total pooled theatres in which any defendant was involved at 437.

** Warner has assigned as error the injunction against performing existing pooling agreements with exhibitors who are not defendants in this action (Error no. 28, R. 3734). As to those exhibitors, the court below said "While our decision will not be *res adjudicata* as to those not parties to the litigation, the parties are necessarily bound, and indeed the decision is a judicial precedent against the others on the questions of law involved in those situations we have referred to where they have unreasonably restrained trade and commerce" (66 F. Supp. at 347 [R. 3541-2]). Warner has been sued by one and is threatened with suit by another exhibitor to compel Warner to perform in violation of this injunction.

fendant thereby eliminates putative competition between itself and the other joint owner, who otherwise would be in a position to operate theatres independently" (Finding 116, R. 3683).

The Court enjoined each defendant from owning an interest in any theatres of less than 95% (Decree, III, 5, R. 3699).

Each defendant is required to divest itself of any such interest unless "such defendant desiring to acquire such interest shall show to the satisfaction of the court, and the court shall first find, that such acquisition will not unduly restrain competition in the exhibition of feature motion pictures" (Decree, III, 5, R. 3699).

This finding and injunction are assigned as error (Errors, nos. 25-27, 29, 33, 37, R. 3733 *et seq.*).

The fallacy of this holding is discussed in Point First of Twentieth Century-Fox Brief and Point II of RKO Brief.

Obviously, ownership of less than 95% of a theatre has no relation to integration, *i. e.*, where the part owner may also be producing and distributing pictures.

Except to the extent that the Court expressly permits on a proper showing the purchase of these outstanding interests, the incidental effect of this portion of the decree will be to deprive defendants of the right to operate approximately 1,292 theatres (Finding 117, R. 3683) which will be added to the 14,578 theatres already independently owned (Finding 118, R. 3684).

On such an assumption* there would thus be 15,780 theatres independently owned as against 2,206 operated by all of the defendants together, an aggregate of only 12% of the total,—a result which would unjustifiably deprive defendants in the aggregate of about ⅓rd of their theatres.

Yet the holding with such disastrous consequences has no relation to any specific evils found below other than the erroneous conclusion that partial ownership was *ipso facto* a restraint of trade.

If this erroneous holding should be sustained, the radical changes resulting in the exhibition business and the first run theatre market in the 92 cities with populations of over 100,000 make obsolete the statistical information relied upon by the plaintiff.

The following statistical information makes abundantly clear the radical consequences which its enforcement might have industry-wide.

These statistics show only a possibility of the effect of the decree because it may well be that if either this portion of the decree is reversed or if the Court should permit defendants to purchase outstanding partial interests, the results set forth would not necessarily follow. They are given, however, to show the

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* All calculations relating to the possible effect of that portion of the Decree relating to partial ownerships of theatres are based on RKO exhibit 11 on which the Court based its Finding 117 relating to partial ownerships. Any calculations based thereon are necessarily approximate and subject to possible error, since that exhibit, prepared hastily at the request of the Court, was no more than an attempt to give the Court a composite picture and was not vouched for as mathematically accurate. Error is also possible because of honest differences of opinion as to what constitutes partial ownership in certain situations.

possible extreme effects of adverse rulings of the statutory court on its reservation of control of this part of the decree.

A.

Heretofore the five defendants had in the aggregate interests in 3,114 theatres located in 942 cities in 48 states.

This holding may affect 710 of these 942 cities (75.2%), including 66 of the 92 large cities (71.7%).

Every state in the Union may be affected.

In 10 states, including one with 243 affiliated theatres, every theatre in which a defendant has an interest may be affected. In 10 other states, there might be left only 1, 2, or 3 theatres in which any defendant had an interest. In 7 additional states, including many populous states, there might be lost 80 to 90% of the theatres in which any defendant had an interest.

B.

Not counting "pools" terminated, the defendants might lose first run theatres in all but 22 of the 88 large cities where any defendant has an interest in any first run theatre.

C.

The dollar volume of business done by the defendants with each other might be substantially affected nationally and in the 92 large cities first run.

Under the new decree such dollar volume will be substantially affected if each of the defendants lose their less than 95% owned theatres to independents.

D.

A graphic illustration of this is to recast Warner's revenue first run in the 92 large cities, from the picture "Princess O'Rourke" (taken by plaintiff as a typical picture at the trial) on the assumption that defendants were not permitted to acquire the outstanding interests in partially owned theatres.

Exclusive of the business which Warner as distributor did with its own theatres, the amount of business first run in the 92 large cities which Warner would do on the assumption that defendants were not permitted to acquire the outstanding interests in partially owned theatres is (Appendix, p. 135, *infra*):

Independents	$264,275	74%
Loews	0	0%
Fox	0	0%
RKO	31,894	9%
Paramount	59,428	16%

On the assumption that defendants were not permitted to acquire the outstanding interests in partially owned theatres, independent theatres (not the other four theatre owning defendants) would become our chief market first run in the 92 cities.

With such a drastic change, where Warners had heretofore licensed Loew's theatres or Fox theatres in any of these 92 large cities, those theatres would

be in the hands of independents. In 5 of those 6 cities where Warner licensed theatres in which RKO had an interest, those theatres would be in the hands of independents. In 4 of the 15 cities where Warner licensed theatres in which Paramount had an interest, those theatres would be in the hands of independents. In 3 other of these 15 cities, the theatres of other defendants would compete with the Paramount theatres as a result of the termination of "pools".

E.

A similar result would follow with respect to Warner as a theatre owning exhibitor.

As a result of the termination of pools and loss of all theatres less than 95% owned in these 92 cities, Warner theatres would have substantial competition from independent theatres in 21 of the 28 cities where there are Warner theatres and from one or more of the other defendants in the others.

In every one of the 92 cities Warner theatres has competition first run.*

(h) The additional sweeping injunction against theatre expansion was far more drastic than warranted.

The unqualified injunction against theatre expansion would so disastrously and vitally affect our business that Warner assigns it as error (Nos. 30-31, R. 3735).

* The situation in Philadelphia and Albany has changed since the trial, as a result of termination of a pool in Albany and the opening of a newly built Goldman theatre in Philadelphia.

Our objection against an unqualified injunction against expansion should be evaluated against the background of Warner's theatres since 1931:

a) In the last 16 years, Warner has not increased the number of its theatres. It now owns 44 less than it did in 1931 (Findings 31-32, R. 3665).

b) Since the consent decree which enjoined a program of general expansion, Warner has not increased the number of its theatres, has filed reports of any changes in its theatre ownership with the plaintiff, and at no time did plaintiff object to any replacement or acquisition which Warner made.

The reason why an injunction against expansion requires some limitation within reason appears from the testimony of Bernhardt in connection with his statement that Warner has "had no policy for the expansion of theatre holdings" (R. 1826):

> "Any theatres acquired * * * were to protect our business and meet the varying economic conditions, shifts of populations or needs caused by obsolescence which had arisen with the changes over the years."

The ban upon expansion departs from the decree ordered in the opinion below which stated that the decree to be entered should not (66 F. Supp. at 359 [R. 3562]):

> "* * * prevent a defendant from acquiring theatres or interests therein in order to protect its investments, or in order to enter a competitive field; if in the latter case, this court or other

competent authority shall approve the acquisition after due application is made therefor."

This went much further than the Consent Decree (XI, [5], R. 3387) which had merely forbidden "a general program of" expansion with the unrestricted qualification that "Nothing herein shall prevent any such defendant from acquiring theatres or interests therein to protect its investment or its competitive position or for ordinary purpose of its business."

Such a sweeping injunction as ultimately granted below would be the equivalent of slow strangulation or divorcement.

Such a sweeping injunction was not granted by this Court against a circuit found to have grown largely as a result of "predatory practices" (*United States* v. *Crescent*, 323 U. S. 173, 186):

> "Where the proclivity for unlawful activity has been as manifest as here, the decree should operate as an effective deterrent to a repetition of the unlawful conduct *and yet not stand as a barrier to healthy growth on a competitive basis.*"

The Court is respectfully referred, for a fuller discussion of this question, to Point Second of the Twentieth Century-Fox Brief and to Point I of the RKO Brief.

The intent to prevent undue growth can adequately be achieved without destruction of Warner's business by an injunction against expansion *unless permission be granted* on an application at the foot of the decree and *after a finding that the proposed acquisition does not unduly restrict or restrain competition.*

No basis for claiming that "extensive experience shows" decree below inadequate. None of its remedies against industry-wide trade practices had ever before been tried and found ineffective.

There is no truth in plaintiff's claim that the decree below bears "resemblance in impact and method to past systems of regulation which have been already tried and found wanting" (Pltff.'s Br., p. 89), and that therefore no decree short of amputation can give adequate relief.

None of the remedies decreed below against industry-wide trade practices had ever before been tried:

1.) Block-booking had actual judicial sanction (*Fed. Trade Com'n. v. Paramount, etc. Co.*, 57 F. 2d 152) until the decree below. The consent decree of 1940 left three of the distributor defendants free to continue block-booking as to all theatres, affiliated and independent, and sanctioned the other defendants as distributors to book in blocks of five after trade showing.

2.) Formula deals, master agreements and franchises had never been enjoined or regulated, except that the consent decree enjoined the consenting defendants as distributors from granting franchises.

3.) Fixing minimum admission prices had never been enjoined or regulated. *Interstate Circuit v. United States*, 306 U. S. 208, merely held illegal a conspiracy to cause some subsequent-run exhibitors in Texas "to increase their admission price to 25 cents." The consent decree of 1940 in no way affected the then existing

practice of inserting *minimum* admission prices in the licenses.

4.) Joint operation of theatres ("pools") had never been enjoined or regulated. The consent decree of 1940 left unaffected this industry-wide practice.

5.) Partial ownership of theatres had never been enjoined or regulated. The consent decree of 1940 left unaffected this industry-wide method of ownership.

6.) Theatre expansion had never been prohibited or regulated. The consent decree of 1940 prohibited the consenting defendants from "a general program of" theatre expansion; and in the cases of *Crescent* (323 U. S. 173) and *Schine* (63 F. Supp. 229) the United States was content with injunctions against theatre acquisition without consent of the court.

7.) Competitive bidding had never been decreed. Two decisions since the decree below have, however, adopted a modified form of competitive bidding to remedy local grievances. (*Bigelow* v. *RKO Radio Pictures,* 162 F. 2d 520, 524; unreported decree in *Goldman Theatres, Inc.* v. *Loew's Inc.,* 150 F. 2d 738).

8.) Clearance: Whether a particular clearance was reasonable or unreasonable has always been a subject of dispute, no matter who owned the theatres involved. Industry boards sought to set up clearance schedules in local areas under the NRA. The United States does not purport to show that where such clearances went into operation, they were unreasonable.

The consent decree of 1940 made clearance arbitrable, but sanctioned as a criterion of reasonableness the "old customer" and certain other criteria (Pltff.'s Appendix, pp. 373-374) abolished by the decree below (R. 3533-3534).

Disputes as to clearance are bound to exist even if every theatre in the country were owned by a separate and different individual. Amputation of theatres from production is no panacea for clearance disputes.

Plaintiff's admission that the very limited relief of the consent decree mitigated "the discriminations inherent in the major defendants' ownership of theatres" (Pltff.'s Br., p. 86) merely serves to underline the probable efficacy of the present decree.

Never has a decree so drastically and radically changed the sales practices of an entire industry.

Never has a decree established a method to resolve disputes over run, as this decree does by competitive bidding.

Never has a decree or code required each license to be "offered and taken theatre by theatre and picture by picture" (Decree II, 8(d), R. 3698), "solely upon the merits and without discrimination in favor of affiliates, old customers or others" (Decree II, 8 (b), R. 3697).

That the decree provides no simple and direct method of enforcement is not the fault of the Court (which urged a continuance of an expanded system of arbitration) or of the theatre-owning defendants (which offered to consent to such an expanded system

as a remedy in addition to contempt proceedings and private anti-trust litigation). We hope that plaintiff's failure to consent to an expanded arbitration system may have been influenced by its desire to have a declaration by this Court as to whether there should be amputation, and that, if the decree below be affirmed in that respect, plaintiff will reconsider its present position.

None of the cases cited remotely tend to show "extensive experience" of the inadequacy of any remedy short of amputation.

Plaintiff's reference, at page 72 of its brief, to the numerous pending private anti-trust suits is disingenuous. No analysis is presented to show, as plaintiff would have this Court believe, that the restraints there alleged will not be prevented by this decree. These private suits, in the main, involve differences of opinion between exhibitors as to which theatre was entitled to a designated run. In some suits, an affiliated exhibitor is the defendant exhibitor. In other suits, an independent exhibitor is the defendant exhibitor. In all suits, those distributors which had licensed the desired run to the defendant exhibitor are of course made parties defendant. The *Bigelow, Goldman,* and *Theatre Investment* cases, described at pages 87 and 88 of plaintiff's brief, involved such disputes over run. No litigation would have been necessary, had the decree below been in effect. The surprising thing is, not that 40 odd suits have been brought, but that so few have been fomented by the sweeping nature of the decision below.

All that *Federal Trade Commission* v. *Paramount, etc., Co.,* 57 F. 2d 152 (Pltff.'s Br., pp. 73-75) held was the validity of block-booking by Paramount in

1926. The Commission sought to make no other order enforcible as the opinion states.

All that *Paramount, etc. Co.* v. *United States*, 282 U. S. 30, and *United States* v. *First National Pictures, Inc.*, 282 U. S. 44 (Pltff.'s Br., p. 80) held was the illegality of an agreement among distributors to insert in all licenses requirements for compulsory arbitration and for assumption of debts of prior theatre owners.

Vitagraph, Inc. v. *Perelman*, 95 F. 2d 142 (Pltff.'s Br., pp. 84-85), involved a conspiracy by distributors to refuse to license pictures on a double feature program in Philadelphia. It was decided in 1938. The consent decree of 1940, however, specifically recognized as a factor in determining the reasonableness of a clearance "The policy of operation of the theatres involved, such as the showing of double features" (R. 3534). Thus, the United States itself recognized a clear distinction between the impropriety of a refusal to license for a double bill and the propriety of taking double billing into consideration in determining proper clearance. It therefore comes with ill grace for the plaintiff to suggest that the *Perelman* case was disregarded because clearance in Cleveland, Ohio, was "graduated in length according to the * * * double feature policy of the" subsequent run theatre (Pltff.'s Br., p. 85).

Youngclaus v. *Omaha Film Board of Trade*, 60 F. 2d 538 (Pltff.'s Br., p. 80), held invalid a Board of Trade clearance schedule as against an exhibitor at Norfolk, Neb. Plaintiff's lengthy footnote 10, pages 81-82, fails to show the subsequent clearance over Norfolk and hence fails to show that the relief was in-

adequate. Nor does it in our opinion show any basis for comparing the clearance set forth in the schedule with the clearance existing in the 1943-44 season. In no event did that case pass upon the propriety of the clearance fixed, merely holding improper clearance fixed by express agreement among distributors. The case obviously does not show that an injunction against unreasonable clearance will be ineffective.

Interstate Circuit v. *United States*, 306 U. S. 208, merely held invalid an agreement between distributors and dominant exhibitor which fixed the admission price of subsequent-run theatres at 25 cents and forbade double billing.

This, and the *West Coast Theatres* case (Pltff.'s Br., pp. 76-79) merely involved local circuits' activities of a kind similar to those in the *Schine, Griffith* and *Crescent* suits. The complete absence of any reference to the *Schine, Griffith* and *Crescent* litigations is significant. For, to disprove the Court's finding that the evils found lie in industry-wide trade practices and not in theatre ownership by producers, plaintiff must distinguish between the conduct of affiliated circuits and independent circuits.

If plaintiff seeks divorcement because of integration, it must at least show that the restraints found below were a result of integration.

It does not show this by mentioning only cases involving affiliated circuits and ignoring all those cases involving individual circuits.

The cases described by plaintiff, show, at most, the necessity for a decree which must have its initial im-

pact upon the distributors if it is to be effective in preventing the undue advantages which the trade practices have been held to give to the circuits or the old customers; that integration was not the cause of these trade practices; that before integration occurred circuits and old customers were receiving these undue advantages; and that outlawing integration will not prevent circuits and old customers from continuing to secure these undue advantages.

Summary of Point I.

The following has been demonstrated:

The trade practices held illegal arose from no attempt to monopolize.

They grew up historically from the complicated nature of this business and bore no relation to integration of production, distribution and exhibition.

They evidenced no moral turpitude and no intent to violate the law.

They are adequately cured by the basic and drastic changes in the marketing of motion pictures, as required by the provisions of the decree.

They have no logical relationship to the drastic remedy of divestiture.

In themselves they constitute no reason at all for inviting what we shall hereafter show are the dire consequences to all of these defendants, to the owners of the now independently owned 14,578 theatres out of the 18,076 theatres of the country, and to the public.

POINT II.

A more fluid method of marketing by competitive bidding decreed as an additional remedy.

A.

Plaintiff urged competitive bidding as an appropriate remedy consistent with the Act.

The initial suggestion of competitive bidding came from the United States when its amended complaint criticized the absence of competitive bidding in this industry (Par. 113, R. 3173; Par. 122, R. 3177; Par. 124, R. 3178).

In summation, plaintiff's counsel, in response to questioning by all three judges, said (R. 2556):

> "Mr. Wright: I see no reason why they [pictures] should not be sold competitively.
>
> Judge Bright: What do you mean by that?
>
> Mr. Wright: Well, putting pictures on the auction block does not appeal to me as anything which is inconsistent with the purposes of the Sherman Act. I do not see why they should not go on the auction block."

This was merely a repetition of the Government's position in response to exhibitor objections to the consent decree. Mr. Sher then said for the Government (pp. 468, 469 of the printed transcript of that hearing):

> "One of the objectives of the anti-trust law, as I see it, is to bring about competition. Now competition in the motion picture industry, the ideal competitive system, would be to have every pic-

ture individually sold to the highest bidder. * * * We did not quite get there, but we approached it, and it seems to me what most of the objections that have been presented here today involve is the objection to competition, and not an objection to the decree."

"It does hurt him if he doesn't want to compete for pictures, but we are as much anxious to have exhibitors compete as we are in having distributors compete."

After the opinion herein had been filed and the *amici* had vigorously protested the relief suggested to inject additional competition into the existing "fixed scale of clearances, runs, and admission prices" which it had found a deterrent to free bargaining (Finding 84, R. 3674), plaintiff's counsel modified his position so as to limit his approval of competitive bidding among and between independents (R. 3009):

"Judge Hand: * * * I don't know quite what your own position is—but about everybody more or less mildly or strongly objects to—

"Mr. Wright: Well, we believe in it as a method of solving controversies between people of relatively equal bargaining strength such as the independent elements of the industry. If two independents want to exhibit the same pictures on the same run which excludes the other one, I don't know any better way to settle that problem than by saying that the one who bids the most money for the run gets the picture, gets the run. Now that, it seems to me, is implicit in any kind of system of competitive distribution that I envisage."

Accordingly, the Court below in a subsequent "Memorandum in re Findings and Decree," interpreted the decree as merely affording "an opportunity to bid for any exhibitor in a competitive area who may desire to do so" (R. 3702), thereby affording the independent theatres the option of whether to invoke competitive bidding in any competitive area.

But *plaintiff's counsel's admission that such bidding would be a good way of settling disputes between independents carries with it an implied admission that competitive bidding is workable,*—or to paraphrase Judge Hand's words, "the technical administrative objections" urged "might be troublesome. I do not imagine that they are insuperable" (R. 2897).

Nor does the decree place unduly burdensome regulations on the Southern District of New York.

Certainly, the statutory court would not have done as it did, if it felt it was assuming too burdensome a duty.

It knew that it could, if requisite, appoint a standing master to decide such controversies as the Department of Justice thought of sufficient merit to require contempt proceedings.

And any exhibitor, dissatisfied with the Department's decision, retains the undoubted right to prosecute a private antitrust suit in which it could urge violation of the decree.

Moreover, there is always the remedy of arbitration as an alternative remedy, if, as and when the Court or the Department of Justice finds existing remedies

too cumbersome. The excuse for the Department's failure to negotiate a broadened arbitration system that the non-theatre owning defendants refused their assent to arbitration, has little force when the Department's primary objection to competitive bidding is that the theatre-owning defendants may have an undue advantage by such bidding.

B.

Opposition thereto merely emphasizes that the practices criticized below were industry-wide, not the consequence of integration, and that disintegration would not inject additional competition into the industry's methods of distribution.

The opposition to competitive bidding voiced here by such divergent units of the industry is the most eloquent proof that the illegalities found below are not inherent in integration, but are industry-wide and require an industry-wide remedy if it be desirable to inject greater competition into the industry's methods of distribution.

The effort of the statutory court to inject greater competition into the existing industry-wide methods of distribution appears to be resisted equally by:

1.) A distributor which neither produces nor exhibits pictures, defendant United Artists.

2.) Distributor-producers who do not exhibit pictures, like defendants Universal and Columbia, and an *amicus curiae* allegedly representing certain self-styled independent producers.

3.) An integrated company with circuits, some of which are 50% or more independently owned, defendant Paramount.

4.) Circuits and individual theatres independently owned, represented here by associations whose membership may include affiliated circuits and other independent circuits.

The straight-forward attempt of the statutory court to "pry open to competition a market that has been closed by * * * illegal restraints" (*International Salt Co. v. United States*, No. 46, this Term) is not resisted by four of the theatre-owning defendants (part of whose theatres may be lost by the decree) who are willing to try the new marketing method (even though some of their remaining theatres may be adversely affected).

Plaintiff, after urging it on the court (p. 41, *supra*), now seeks to straddle, recognizing its propriety for every one except the five theatre-owning defendants (Plaintiff's assignment of error, no. 10, R. 3722).

The very nature of the opposition to even a trial of competitive bidding serves again to emphasize:

1.) The industry-wide nature of the distribution practices criticized below;

2.) That such industry-wide practices were not created by integration and are not inherently bound up with integration; and

3.) That separation of exhibition from production and distribution would not tend to inject into the existing industry-wide marketing practices that additional competition which it was the aim of the court to promote.

C.

Facts found below which prompted the court to try out competitive bidding.

The statutory court found (R. 3674):

> "85. Competition can be introduced into the present system of fixed admission prices, clearances, and runs, by requiring a defendant-distributor when licensing its features to grant the license for each run at a reasonable clearance (if clearance is involved) to the highest bidder, if such bidder is responsible and has a theatre of a size, location, and equipment adequate to yield a reasonable return to the licensor. In other words, if two theatres are bidding and are fairly comparable, the one offering the best terms shall receive the license."

There were no facts which compelled any other finding in the record, although in making this finding the Court below had in mind specifically the pressure of "independent" circuits on distributors (Finding 154, R. 3690), the failure of plaintiff in this case which has been pending since 1938 to adduce similar evidence as to any affiliated circuit, and the obvious fact that self-interest would be a greater deterrent of maltreatment of prospective customers to an integrated company than to an independent circuit.

D.

Hypotheses and argumentation no substitute for facts found and provision for modification after trial.

The statutory court, having found as a fact that competition "can be introduced into the present system" by the provisions of the decree below (Finding 85, R. 3674), reserved jurisdiction to modify its decree (Decree, VIII, R. 3701) if actual trial should prove its finding incorrect.

Those who resist such a trial—whatever their motives—merely ask this Court to substitute their fears, hopes, or arguments for the facts found below and the pragmatic device decreed to prove the correctness of those facts.

As so recently said by a majority of this very Court in *International Salt Co.* v. *United States*, No. 46, this Term, (reiterating a statement of a majority thereof in an earlier case, hereinafter quoted, p. 115, *infra*):

> "We think it would not be good judicial administration to strike paragraph VI from the judgment to meet a hypothetical situation when the District Court has purposely left the way open to remedy any such situations if and when the need arises. The factual basis of the claim for modification should appear in evidentiary form before the District Court rather than in the argumentative form in which it comes before us."

E.

Such hypotheses and arguments without substance.

The gravamen of the opposition to a trial of competitive bidding, both below and here, was and is that competitive marketing would leave a large circuit with some competitive advantage over a smaller circuit (or any unit of more than one theatre with such advantage over a single theatre).

The essence of these hypotheses is that—

1.) The statutory court ignored the possibility that competitive bidding might be abused by a larger circuit and that

2.) Despite the deliberate reservation of power to modify its provisions to meet conditions as they developed, the statutory court would be helpless to remedy any abuse which might develop.

We need not discuss—as not here directly involved—the question as to whether this Court should hold that the Act intended to level all industrial units so that no unit more favorably situated could possibly have any advantage over a less favorably situated unit.*

The statutory court, however, did not ignore the possibility of such abuse of competitive bidding. Indeed, in its Opinion (66 F. Supp. at 346 [R. 3540]),

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* This in effect is what certain *amici* urge when they protest that an independent theatre which has no money invested in a film produced will bid at a competitive disadvantage against a theatre owned by Warner, for example, which has first call on its own 19 features in which Warner has invested 19 × $1,350,000.

repeated in Finding 85 just quoted, it emphasized that "if two theatres are bidding and are fairly comparable the one offering the best terms shall receive the license". Not only is that philosophy repeated in II, 8 (c) of the decree (R. 3697): subdivision (d) of that section provides specifically that (R. 3698):

> "(d) Each license shall be offered and taken theatre by theatre and picture by picture".

and subdivision (b) thereof provides specifically that (R. 3697):

> "(b) Each license shall be granted solely upon the merits and without discrimination in favor of affiliates, old customers or others."

The requirement of offer and acceptance picture by picture and theatre by theatre, without discrimination in favor of affiliates, old customers or others, coupled with its reservation of jurisdiction to amend the decree, was fair warning to the entire industry that it intended to enforce *fair* competitive bidding.

That independent circuits and theatres had no illusion on that score is amply shown by the opposition to any interference with the "old customer" practice. Heretofore, as the defendant distributors testified, when there was competition for the grant of a run, and all competitive factors were deemed equal, the distributor granted the run to its old customer when that old customer was a satisfactory customer. The decree below upsets the prevalent view that a satisfactory old customer was entitled to such consideration.

Much of the objections to competitive bidding is basically no more than the wolf of the "old customer"

theory dressed in sheep's clothing of impracticality* and alleged fear of abuse thereof by those who wish to remain as favored customers.

There is however no substance to the fear that defendants will abuse the new marketing system.

The Court below pointed out that "we cannot find sufficient evidence to support an inference that the major defendants here, though controlling some of the largest circuits of theatres in the country and thus possessing potential weapons of great strength, have either collectively or severally entered upon a general policy of discriminating against independents in their grants of clearances" (66 F. Supp. at 342 [R. 3532]), "film rentals, clearances, or minimum admission prices" (66 F. Supp. at 353 [R. 3551]).

That defendants did not voluntarily heretofore resort to this method of marketing is the best evidence that it will not be used oppressively now that it has been directed by a court. Warner has been free to require competitive bidding during the last 19 years since Warner first acquired theatres and in all of the 24 years since Warner's incorporation. During all this time Warner received about 60% of their domestic film revenue from independent theatres when it could have resorted to competitive bidding, had it so chosen.

A distributor's own self-interest, now buttressed by authoritative judicial decision, will prevent abuse of the new marketing method prescribed.

* The reservation of the power to amend takes care of the possibility that actual operation may require some modification in the technique of competitive bidding in order to make it more fluently workable.

And that same self-interest, now reinforced by the sanctions of the decision below, will tend to restrain its abuse by independent circuits at the expense of individual theatres. Indeed, the real fear of the independents is not of the defendants who must do business with them, but of the large independent circuits that have in the past attempted coercive measures against both independents and the defendants, as the opinion below indicated. The decision below for the first time offers defendants a sanction for resisting such sporadic attempts at oppression by independent circuits, as were found in *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, and *United States* v. *Schine Chain Theatres*, 63 F. Supp. 229, argued here this Term.

Thus, the claim of some exhibitor organizations that the defendant exhibitors will overbid in order to keep a picture from a competitor is merely their opinion without factual basis. The record is barren of any such evidence. The same arguments were made to the lower Court, and after due consideration the lower Court nevertheless inserted provisions for competitive bidding in the decree, including the prohibition against "discrimination in favor of affiliates", and the retention of jurisdiction to take any action required in the event that it be demonstrated in the future that the competitive bidding system is being abused.

The competitive bidding system will also throw on the five defendant-exhibitors the necessity of open competition for first run licenses in the 92 cities of the United States with population of more than 100,000.

Plaintiff has charged that in 38 of the 92 cities, one or more of the defendants operated all of the first run theatres, and that this was true of more than 100 cities of between 25,000 and 100,000. With the injection of the competitive bidding system into the marketing of film, no independent theatre owner desiring a first run in those cities and operating a theatre suitable for first run exhibition will be excluded from that first run market. No circuit, whether affiliated or independent, can use its buying power to secure the privilege of an unjustified first run.

A few additional comments will serve to answer such additional arguments against competitive bidding as are raised by the alleged Petitioners-Appellants, American Theatres Association, Inc. et al., in appeal No. 85.

These Associations object to competitive bidding as ineffectual to accomplish the relief sought by the Court, because such increased competition may tend to raise the prices of film rentals. They thereby incorrectly assume that the Court sought to control the prices of film rental.

Whatever the incidental effect of increased competition on the prices of film rentals, competitive bidding will remedy the primary evil of which the plaintiff complained and which the Court sought to remedy. This had nothing to do with the price of film rentals as is obvious from the "Conclusion" of the brief of these Associations, which describes (p. 28);

> "The evils found to exist are a combination by the defendants to exclude independent exhibitors from preferred runs * * *. To meet that situa-

tion, the Court has devised an assumed remedy by competitive bidding."

More accurately stated, the primary evil sought to be remedied was the dificulty of any theatre, actual or potential, to break into or change the existing system of run and clearance. That evil will be cured by competitive bidding, whatever the incidental effect of increased competition for film and preferred runs on rentals paid. If the result of additional competition for film of theatres, actual and potential, has an incidental effect on the prices of the rentals paid, it is merely an incidental result of the greater competition which the Sherman Act was designed to promote.

The philosophy of the Sherman Act is based on a price structure which is the result of competition.

Where competition is keen,—as here, for the very best of the pictures on preferred runs,—the price in a free market will be what the traffic will bear, no matter what form the selling takes.

The only new element which competitive bidding injects into the situation is the opportunity of a theatre to secure something better than its competitor if it thinks the risk worth the gamble.

It is true that in the long run "Auction bidding does not in any way remove the handicap of those bidders who are in an inferior bargaining position" (Br., p. 13). In the long run, the inferior theatre will not—and should not—be preferred to the superior. All that competitive bidding—and the Sherman Act—seek to accomplish is so to release the forces of competition that each of the 18,000 odd theatres in

this country may reach its own competitive level, "in fair mercantile battle",—to borrow a phrase from page 11 of the brief of these Associations.

Throughout their brief, there is implicit and explicit insistence upon "stability", "continuous supply of products", "assurance of a continued supply" (Br., p. 16). Unfortunately, however, neither the Court, plaintiff nor the Sherman Act can assure both "stability" of product and freedom of competition. Theatres cannot have their cake and eat it too.

The suggestion that anything in the decree sanctions defendant's theatres engrossing the market (Br., pp. 15-17) is indeed an argument of desperation. An injunction against licensing except on competitive bidding is not a sanction that competitive bids may be so used as to violate the Act. If Warner should engross the market in Lawrence, Massachusetts, for example (Br., p. 19), the independent Capital Theatre would have the same rights whether or not it were afforded the privilege of competitive bidding. However, despite the alleged conspiracy, the brief concedes that "At the present time, the Capital Theatre is able to obtain sufficient quality product to operate". (Br., p. 19). It is idle to speculate that the Capital would fare worse after than before the injunctions contained in the decree below.

The same comment applies to the claim that "The decree gives the defendants a further advantage by allowing them to preempt their own pictures" (Br., p. 17). The decree "gives" defendants nothing. It merely fails to compel defendants to bid competitively for their own pictures in their own theatres. The decree "gives" them neither their pictures nor their

theatres: They paid for both in the hope and expectation of profit.

A good portion of the brief (and especially pages 20-24) purports to show that no objective criteria of the best bidder are possible in this industry, and that, therefore, competitive bidding is unworkable. Plaintiff's counsel did not think so (p. 41, *supra*). And it cannot be seriously claimed that the theatres of these Associations have been licensed their films on the runs they now enjoy with no objective criteria establishing their right thereto. For that would be an implied admission that their present successful operation is solely the "result of well established business relationships", the "old customer" theory.*

The claim that bidding is "unworkable" and "will create substantial unnecessary difficulties in operations" (Br., pp. 24-27), should also be appraised against protests of unworkability, when it was suggested at the time of the formulation of the consent decree that licenses be limited to blocks of five features after trade showing.* Actual operation in that way in the eight years since 1940 exploded that myth. Indeed neither Warner nor its customers have experienced difficulty or hardship in selling picture by picture subsequent to 1940.

It is obviously true that it is easier and simpler for "those who have" if they can be assured from year

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* Mr. Sher said for the Government, in response to the fears voiced at the hearing on the consent decree (p. 474 of the printed transcript of the hearing):

> "But these dire predictions as to what will come before the new method of selling has had a chance, do not seem to be justified."

to year of "a continuous supply of product sufficient to operate their theatres" (Br., p. 17) presumably on a run satisfactory to them. But if it be desirable to have greater fluidity instead of the alleged existing "stability", some slight additional inconvenience to both theatres and distributors should not be too big a price to have to pay for increased competition.

It is not, we submit, too much to ask the industry to suffer some slight additional inconvenience in making an honest attempt to secure that greater degree of competition which the Court below and the Sherman Act sought to promote.

If, in fact, any of the competitive bidding provisions create too great confusion or hardship where they are invoked, the Court has reserved jurisdiction to make appropriate modifications; and our thousands of clients throughout the country such as members of these Associations may rest assured that, if undue inconvenience or hardship ensues, Warner will make appropriate representations to the Court to remedy any such result.

POINT III.

There was no monopolization of production, distribution or exhibition by any or all of the defendants.

A.

No monopolization of production.

The Court found there was no monopolization or restraint of trade in production (R. 3670):

> "59. There exists active competition among the defendants and others in the production of motion pictures.
>
> 60. None of the defendants has monopolized or attempted to monopolize or contracted or combined or conspired to monopolize or to restrain trade or commerce in any part of the business of producing motion pictures."

Indeed, not only was this conceded below (R. 1952, quoted on pp. 104-105, *infra*): plaintiff's counsel conceded that any feature suitable for first run exhibition was assured of and secured adequate distribution (R. 387, 388, 1949, quoted on pp. 104-106, *infra*).

B.

No monopolization of distribution.

The Court found no monopolization of distribution (Finding 152, R. 3689):

> "There is no substantial proof that any of the corporate defendants was organized or has been maintained for the purpose of achieving a na-

tional monopoly either in * * * distribution * * * except as found in findings 153 and 154 below."

Finding 153 related to alleged first-run monopolies in a single locality, as to which the Court found "there is no sufficient proof that it has been for the purpose of creating a monopoly" (R. 3690).

Finding 154 referred to the industry-wide trade practices found as "illegalities and restraints", including "admission price-fixing" and "non-competitive granting of runs and clearances", heretofore quoted on page 8, *supra*.

Thus, the Court below obviously did not find or intend to find monopolization by "an exclusionary conspiracy" as plaintiff claims (Br., p. 56).

It merely found that certain uniform trade practices were restraints such as the Act condemned and such as might simply be remedied by declarations of illegality and injunctions.

It found merely a conspiracy as to "a price-fixing system" (Finding 70, R. 3672), concert of action in "a uniform system of clearance and run" (Findings 81-83, R. 3674), and a resultant "fixed scale of clearances, runs, and admission prices" which was a deterrent to free bargaining (Finding 84, R. 3674).

That the conspiracy found was in no sense exclusionary is obvious from the fact that the system affected all theatres, independent or affiliated, as the Court found (66 F. Supp. at 346 [R. 3539]).

Indeed, in discussing discrimination among licensees, the Court specifically stated (66 F. Supp. at 353 [R. 3551]):

> "The foregoing is not to be construed, however, as indicating that the distributor-defendants have discriminated among their licensees with respect to film rentals, clearances, or minimum admission prices."

Moreover, the Court found the necessity and desirability of run and clearance (Findings 74-78, 83, R. 3673) and the advantage to the public of such a system (Findings 74-76), even though run and clearance by definition involve some measure of exclusivity, just as every contract of purchase necessarily excludes the possibility of someone else buying the very same article.

And it was only because the result was uniform as to all pictures in any given theatre that the Court found concert of action and a uniform system (Findings 81-83, R. 3674).

The Court therefore did not find that the system of runs and clearances was "an exclusionary conspiracy".

It merely found that the "fixed scale of clearances, runs, and admission prices" was a deterrent to free bargaining (Finding 84, R. 3674), and that (R. 3674):

> "85. Competition can be introduced into the present system * * *."

by competitive bidding.

Restrictions as to minimum admission prices (Findings 62-72, R. 3670), were found illegal despite the

finding that those included in licenses were "the usual admission prices currently charged by the exhibitor" (Finding 63, R. 3670). With block-booking and franchises covering long periods, this may well have been such a restraint as to have caused the Court to find the intent to maintain prices at artificial levels (Finding 67, R. 3671), "an effective system of price control" (Finding 71, R. 3672) and an attempt to channel patronage into prior-run theatres by such "differentials in admission price" (Finding 72, R. 3672).

But with bulk licensing prohibited, no such consequences could flow from inserting in each separate license for a single picture "the usual admission prices currently charged by the exhibitor" (Finding 63, R. 3670), and in any event even the remote possibility thereof no longer survives the injunction against minimum admission prices.

There is thus nothing in the conspiracy found remotely resembling "an exclusionary conspiracy".

Nor is there any reason why such evils as have been found to exist may not be simply and adequately cured by the injunction against uniformity and price fixing.

That the effect of the conspiracy found has been negligible is obvious from the fact that the Warner theatres have only taken in 6% of the total dollars paid at the box offices of this country (p. 138, *infra*), a small enough percentage for 3% of the total theatres to collect when it is remembered that Warner's total investment was $89,369,896 in theatre properties (Ex. W-14) and approximately $26,000,000 for the 19 features produced in 1945 (Ex. W-10).

C.

Warner alone did not monopolize exhibition.

In 30 states with 1,429 cities of over 2,500 population, Warner has no theatres.

In the remaining 15 states with 1,933 such cities, Warner has theatres in only 178, as follows:

State	Number of Cities where Warner has one or more theatres	Number of Cities where Warner has no theatres
Oklahoma	1	74
Tennessee	1	56
Oregon	1	33
Illinois	1	210
Indiana	1	98
Delaware	1	7
Washington	2	38
Maryland	4	21
Virginia	5	48
West Virginia	6	39
California	6	159
Wisconsin	8	85
Massachusetts	10	177
New York	12	189
Connecticut	16	16
Ohio	16	168
New Jersey	43	132
Pennsylvania	43	206
District of Columbia	1	0
	178	1,756

The Court found no monopolization of exhibition (Finding 152, R. 3689):

> "There is no substantial proof that any of the corporate defendants was organized or has been maintained for the purpose of achieving a national monopoly either in * * *, distribution or exhibition of motion pictures, except as found in findings 153 and 154 below."

The exception in finding 154 related to the restraints in distribution by trade practices heretofore discussed, "not in the ownership of many or most of the best theatres" (Finding 154, R. 3690).

Finding 153 related to "localities where there is ownership by a single defendant of all the first-run theatres", as to which the Court found "there is no sufficient proof that it has been for the purpose of creating a monopoly" (R. 3690).

At the present time Warner does not own all of the first run theatres in any of the 92 cities with populations exceeding 100,000, nor did plaintiff claim that Warner had the only theatre or all of the theatres in any one of the 320 towns of population between 25,000 and 100,000.

Plaintiff did contend that Warner had the only theatre or all of the theatres in 58 of the 6,257 towns with populations of less than 25,000 (R. 359). Of the 58 towns which plaintiff listed as having only Warner theatres:

> 7 are suburbs of Philadelphia, Pittsburgh, and Boston (Ambler, Pa.; Bala Cynwyd, Pa.; Elkins Park, Pa.; Etna, Pa.; Jenkintown, Pa.; Prospect Park, Pa.; Willow Grove, Pa.) (R. 378).

6—By reason of lease, contract, and pool termination, Warner no longer has any interest in theatres in Amesbury, Mass.; Newburyport, Mass.; Waverly, Mass.; Lansdowne, Pa.; Lake Geneva, Wisc.; Delavan, Wisc.

10 will be subject to the order for disposal under court supervision as joint interest theatres (Beverly, Bordentown, Bridgeton, Clementon, Moorestown, Pennsgrove, Riverside, Swedesboro, Woodbury, and Mt. Holly, all in N. J.) (R. 378-379).

There is now operating an independent first run theatre in Batavia. There is no town of Collin, N. J. (R. 378).

As to the remaining 33 of these towns in which Warner has the only theatre or theatres, the plaintiff did not contend that those theatres were illegally acquired to stifle competition or that the operation of those theatres resulted in driving competitors out of business or that those theatres were operated in a manner to prevent competitors from entering those towns. The plaintiff merely introduced a list of towns in which Warner had the only theatre or theatres.

In any event, plaintiff asked no relief as to any such specific locality (R. 2769, 2777-8).*

* "Mr. Wright: * * * I agree that the mere fact of sole possession of physical facilities in any location does not mean a monopoly" (R. 2769).

"Judge Hand: * * * you do not seem to pay any attention to local situations except as evidence of something larger. I do not know whether you do or not. I do not know whether you make any real complaint about Albany and other places, or whether you merely think they are sort of malignant symptoms.

"Mr. Wright: I think that the latter is a more correct description" (R. 2777-8).

D.

The Warner defendants, as an integrated unit, do and did not constitute a restraint or monopolization of trade.

As we have heretofore shown, the activities of Warner as producer, distributor and exhibitor did not and do not result in any restraints or monopolizations of trade, other than in conformance to trade practices, 21 pooling agreements and the joint interests banned by the decree below.

Plaintiff, at page 91 of its brief, claims that even under the decree there will remain a restraint of trade and monopolization "with respect to that important segment of trade represented by the pictures it distributes to its own theatres". Plaintiff then proceeds to attempt to establish this conclusion by charging that other companies (and stating without evidence that Warner similarly), acquired theatres for an illegal purpose, *i. e.*, that other companies (and, Q. E. D. Warner) "integrated theatre operations with film distribution in order to have non-competitive market outlets for their films"; that "such integrations were in no sense an effort to meet an expanding business demand resulting from superior skill in film production or distribution"; that such integration was "a deliberate creation of a market control" which would assure "retail outlets regardless of the merits of product". Then, at page 104, plaintiff concludes that theatres were acquired "by deliberate, calculated purchase for control".

Plaintiff refers to no evidence or no findings as to Warner to support these statements of fact. The evidence is to the contrary.

Warner started as an exhibitor of motion pictures and by 1916 was in the business of producing pictures, distributing pictures and operating a few theatres (R. 1553).

When Warner had successfully pioneered the development of the talking motion picture and was unable to find theatres equipped to play those pictures, because the minimum cost of installing talking equipment in theatres was $25,000, and very few theatre owners were willing to make such investment on such gamble, Warner was able to acquire in 1928 a circuit of 250 theatres (Finding 26, R. 3665; R. 1555), largely because the principal manager of the circuit had died and the circuit needed trained management (R. 1555). This transaction gave Warner 250 theatres which could be immediately equipped with sound installation (Findings 27-29, R. 3665). The talking motion picture was here to stay, but theatre owners either did not have the money to equip their theatres for talking motion picture exhibition, or did not want to take the gamble, or did not want to invest where the supply of talking motion pictures was so small as not to permit of a full year's program. Warner had the alternative of either abandoning the talking motion picture,—that it did not is the only reason why there is today any such business,—or acquiring theatres and equipping theatres for the exhibition of those pictures.

Clearly these theatre acquisitions were "an effort to meet an expanding business demand resulting from superior skill in film production" and were in no sense "a deliberate creation of market control which would assure them of retail outlets regardless of the merits of their product" (Br., p. 91).

Since 1931 there has been no policy by Warner for the expansion of its theatre holdings, so that today it has an interest in 44 less theatres than it had in 1931, although the total number of theatres in the United States grew from 13,386 in 1935 to 18,076 in 1945 (R. 1557, 1826; Findings 32, 145, R. 3665, 3688). This further negates plaintiff's implied innuendo that Warner sought theatres to insure an outlet for its talking pictures regardless of their merit. Indeed, any such express claim would be so palpably incredible that it has not even been attempted.

Plaintiff next contends that the use given Warner pictures in Warner theatres constitutes monopolization and restraint of trade because "all other distributors are excluded from that important segment of the market" and other exhibitors "are excluded from the opportunity of licensing the exclusive runs" (p. 92). In plain Anglo-Saxon, this means that Warner by licensing its own theatres to exhibit its own pictures unduly engrosses the market.

Plaintiff, since it must, recognizes "the right [of a manufacturer] to use his own product in his own outlets, so long as he does not use the advantage resulting from integration to restrain *unreasonably* the competition of others or to monopolize" (p. 103), and hence concedes that integration *per se* is legal though necessarily resulting in some restraint of trade, but that in determining whether such restraint is in violation of the Sherman Act, the test of reasonableness is to be applied.

Contrast the facts of the *Lehigh* case (254 U. S. 255) upon which plaintiff so heavily relies, where there had been deliberate monopolization of all the

anthracite coal which it was humanly possible to produce from the field adjacent to this and other railroads, both in transportation and resale of about 20% of the entire country's supply, actual or potential, with the case of Warner as an alleged integrated monopoly:

1.) Unlike Lehigh, Warner does not monopolize the supply. Warner has no control whatsoever over the potential supply, and produces only 5% of the present supply of the very best pictures.

2.) Unlike Lehigh, Warner does not monopolize the distribution of a monopolied supply. Warner distributes its 19 pictures to any of the 18,000 odd theatres now in successful operation and to any more that are building or may be built. It uses its own theatres as an outlet for its 5% of the present supply in only 3% of the national total of theatres (5% of 3% is 15/100 of 1%), and continues to license those pictures on the next run to competitors of its own theatres.

These statistics already reflect any restraint assumed to flow from the illegalities found below.

3.) Unlike Lehigh, Warner does not monopolize the sale of a supply, monopolized in production and distribution. The Warner theatres in exhibiting their own 19 pictures and any other pictures which it is desirable and feasible to exhibit merely collect 6% of the admissions paid at the box offices of this country (p. 138, *infra*).

Warner theatres are not claimed to be the

sole outlet today (either first run or on all runs) anywhere other than in approximately 60 small towns as to which there is no evidence that any of them could have supported other theatres.

With regard to the effect on exhibitors of the preference given Warner pictures in Warner theatres, only the exhibitor in competition with a Warner theatre can possibly be affected. Warner distributes 19 pictures or about 5% of the total number of pictures distributed. Exhibitors who compete with those Warner theatres are free to license these 19 pictures on the next run.

There is no showing that any exhibitor who competes with a Warner theatre reasonably requires the 19 Warner pictures, in addition to the remaining 240 or more pictures available, in order to operate successfully. In the absence of such showing, plaintiff can not contend that Warner as an integrated unit unreasonably restrains the trade of exhibitors.

With regard to the effect upon distributors of the use made of Warner pictures in Warner theatres, the so-called "important segment of the market" is 3% of the theatres in the United States (Finding 118, R. 3684). There is no showing that any distributor whose pictures are available to a Warner theatre has been excluded from that theatre because of its use of Warner pictures. "Except for a very limited number of theatres in the very largest cities, the 18,000 and more theatres in the United States exhibit the product of more than one distributor. Such theatres could not be operated on the product of only one distributor" (Finding 151; R. 3689). It follows that all Warner theatres (except one or two in the very largest cities)

require more than the 19 Warner pictures in order to operate. How then can it be contended that other distributors are excluded from the Warner theatres? In exceptional areas, such as New York City and Los Angeles, Warner operates with Warner pictures alone. There has been no showing of any scarcity of first run Broadway or Los Angeles outlets which would warrant plaintiff in claiming that thereby other distributors are excluded from securing first run Broadway or Los Angeles exhibitions.

In the few towns where Warner has the only theatre or all the theatres (discussed at pages 62-63, *supra*), there has been no showing that only Warner pictures are exhibited, or that the Warner pictures exhibited constitute so large a segment of all pictures exhibited as to lead to the conclusion that other distributors have been excluded.

To recapitulate. Warner did not acquire its theatres to secure an exclusive outlet for its pictures. Nor were those theatres acquired to achieve a market control of retail outlets. As an integrated unit, its pictures are preferred in exhibition at its own theatres. There has been a complete failure of proof that competing exhibitors or competing distributors are thereby unreasonably restrained.

With regard to plaintiff's claims of monopolization of trade by reason of integration, there has been no showing that exhibitors have been driven out of business or have been prevented from successfully operating theatres because Warner pictures are given prior

runs in Warner theatres. There has been no showing that distributors have been driven out of business or have been prevented from successfully engaging in business because Warner pictures are given preference in Warner theatres. There can be no monopolization where the Warner pictures constitute at most 5% of all pictures distributed, and where Warner theatres constitute 3% of all theatres in the United States.

The entry of about 5,000 more theatres into the field since 1935; the decrease of Warner theatre holdings by 44 since 1931; the entry of many more independent pictures (R. 2797); the entry of more distributors and the success of smaller distributors (discussed at pages 83, 106, *infra*); and the decrease in the number of pictures distributed by Warner from 58 in 1936-37 (R. 3156) to 19 in 1943-44 (Finding 99, R. 3677), completely negative any claim that the integration by Warner as a distributor and exhibitor constitutes monopolization.

The inter-company payments by Warner theatres to Warner as a distributor are of no import, since they do not represent substantial exclusion, as in the *Lehigh Valley* or *Yellow Cab* cases where *exclusive* dealing arrangements were made for all of the anthracite coal along a line exclusively serving 20% of all anthracite coal, or where taxicab monopolies in three large cities agreed to deal only with one taxi manufacturer.

The complete inability of outsiders to get any of the business in those areas, and not the money involved, was the factor.

Here no exclusive dealing arrangements are involved, and there is no evidence and can be no evidence that the integration of Warner as distributor and exhibitor rendered it impossible for any distributor to have its picture shown in a Warner theatre, or rendered it impossible for any exhibitor to secure sufficient product to operate successfully on the run desired.

Integration does permit Warner as a distributor and Warner as an exhibitor to agree as to the admission prices which Warner will charge as an exhibitor when showing Warner pictures. The public and the forces of competition make that determination. However, as plaintiff admits, a single trader always has the right to fix the price which it will charge absent an agreement with competitors, so long as others are not excluded from the market (Br., p. 103).

The *General Motors* case (121 F. 2d 376) does not hold otherwise. Nothing in that opinion held it illegal for General Motors to operate its own retail outlets and use the services of its own finance affiliate company. What was held illegal was General Motors' coercion of its 15,000 independent dealers by insisting that those dealers choose the General Motors finance affiliate in preference to independent finance companies. "In the instant case the coercion practised upon General Motors dealers assumed the form of various restrictions in the nature of tying limitations" (121 F. 2d at 398). Tying contracts are always illegal unless satisfactorily justified as reasonable.

Although plaintiff admits that integration is not *per se* illegal, it argues that there is "no economic justification for the integration here involved" (p. 105). Plaintiff produced no evidence in proof of this conclusion. Its arguments that these defendants have used their integrated positions to conspire with each other and that integration therefore has provided the means for the accomplishment of those conspiracies is directly contrary to the finding below, that the trade practices of the defendant distributors and not theatre ownership were the cause of the illegalities.

The *Swift* case (286 U. S. 106) does not even remotely support plaintiff's position. The limits of that decision are twice stated, at the beginning and near the end of the discussion:

> "The defendants, controlled by experienced business men, renounced the privilege of trading in groceries, whether in concert or independently, and did this with their eyes open. * * * Whatever persuasiveness the reasons then had, is their with undiminished force today" (p. 115).
>
> "There is need to keep in mind steadily the limits of inquiry proper to the case before us. We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. The injunction, right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. * * * Nothing less than a clear showing of grievous wrong evoked by new and unforseen conditions should lead us

to change what was decreed after years of litigation with the consent of all concerned."

That consent decree involved five companies alleged to have achieved "an unlawful monopoly of a large part of the food supply of the nation" (p. 111), suppressing competition in the purchase of live stock and in the sale of dressed meats "* * * through agreements apportioning the percentages of live stock to which the members of the combinations were severally entitled" (p. 110).

E.

Warner cannot be treated collectively with other defendants to establish monopolization of exhibition.

The opinion below states that (66 F. Supp. at 354 [R. 3553]):

"The five major defendants cannot be treated collectively so as to establish claims of general monopolization in exhibition"

and the Court found that (R. 3684):

"119. The present theatre holdings of the five defendant-exhibitors * * * aggregate little more than one-sixth of all the theatres in the United States, and by such theatre holdings alone the defendants do not and cannot collectively or individually have a monopoly of exhibition."

These findings are too amply supported by undisputed facts for this Court to be able to hold, as a matter of law, that defendants' theatres may be treated collectively.

The heart of plaintiff's claim below was that because defendants individually do business with each

other and because the arithmetic sum of all their business is large, a conspiracy or combination to monopolize exhibition must be inferred (by arithmetic) sufficient to compel divestiture.

We marshal the evidence which caused the Court to reject this alleged mathematical monopoly.

Collective treatment of separate companies would be improper where, as here:

1.) Each separate company acquired differing numbers of theatres for varying reasons at different times, paid varying sums for film exhibited, and collected divergent sums at the box office;

2.) Each separate company did a different percentage of its business with independent theatres in any one year and from year to year; and

3.) Warner's business, as licensor and licensee, with each of the other defendants differed in each year, from year to year, both nationally and in the 92 large cities first run, and there was no relationship between what Warner licensed to and licensed from any other defendants.

Nor is there anything which compels collective treatment of separate companies (or a finding of illegality) in the fact that one theatre-owning defendant licenses some of its features to a co-defendant's theatres for exhibition and that said co-defendant licenses some of its own features for exhibition in said theatre-owning defendant's theatres (so called "cross" or "diagonal" licensing).

We urge that the divergence in business practice among the defendants, the complete absence of any

backscratching (accommodating licenses from a defendant for licenses to a defendant), and the sharp competitive character of the business, dispel any possibility that Warner could be arbitrarily lumped together with other defendants as a monopoly.

1.) Differences between the theatres of each separate company (the manner of, reasons for, number of, times of acquisition, amounts paid for film, and sums collected at the box office) all negative collective treatment.

Columbia and United Artists have never had theatres.

Universal disposed of its theatres in 1926, that voluntary divestiture resulting in the independent Schine and Griffith circuits (Amended Complaint, Par. 78, p. 3163).

Loew's theatres were vaudeville houses many years before nickelodeon films were first shown (R. 1838-9), probably 20 years before Warner first acquired theatres from the Stanley Company in 1928 (Findings 27-29, R. 3665). Loew's now has 135 theatres or less than 1% (0.74%) of all theatres in the country (Finding 118, R. 3684).

RKO's theatres were the Keith-Orpheum theatre circuit for a generation before they were acquired by RKO in 1928 (Findings 18, 21, 121, R. 3664, 3684) for the purpose of obtaining an effective means of developing the use of its motion picture sound recording and reproduction devices (Finding 18, R. 3664). RKO now has interests in 109 theatres or less than 1% (0.60%) thereof (Finding 118, R. 3684).

Paramount began to acquire theatres between 1917 and 1919 in order to find an outlet for its features which had been closed by a group of theatres which

had gone into production under the name of First National (Findings 5-8, R. 3661). Before the decree below becomes effective, it and its affiliates had 1,395, a little less than half of all the theatres owned by defendants and 7.72% of all theatres in the nation (Finding 118, R. 3684).

Warner acquired its theatres in 1928-1931 in order to realize on its development of talking motion pictures (Finding 25, R. 1555-6). "Today the Warner Companies have an interest in 547 theatres,—a net reduction of 44 from its peak holdings of 591 in 1931" (Finding 26, R. 3665; and R. 1557-8). This is only 2.77% of the theatres in this country (Finding 118, R. 3684).

While Warner thus effected a net reduction of its theatre holdings, "some of the independent competitors of Warner [not defendants here] have increased their theatre holdings * * * and have acquired theatres which Warner had formerly operated" (R. 1558).

While the total number of theatres in the United States grew from 13,386 in 1935 to 18,076 in 1945 (Finding 145, R. 3688),* Warner effected a net reduction in its theatre holdings.

Compared to the phenomenal growth of theatres in the country,—from 13,386 in 1935 to 18,076 in 1945 (Finding 145, R. 3688), the growth of theatres affiliated with all of the defendants since 1935 has been negligible.**

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* "Mr. Wright: * * * There have been 5,000 more theatres in the last ten years, and of course there are many more independent pictures * * *" (R. 2797).

** These actually had fewer theatres in 1945 than in 1935:
Warner (Finding 32, R. 3665)
RKO (Finding 22, R. 3664)
Loew's (Findings 120, 118, R. 3684)

All of the defendants account for only 3,137 out of the 18,076 theatres in the country (Findings 117-119, R. 3683).

The number of new independent theatres since 1935 is thus 4,690—1,553 more new independent theatres than the total of defendants' theatres.

The amount each theatre-owning defendant collects at the box offices of its theatres likewise differs. The five theatre-owning defendants collected varying percentages of the gross theatre admissions of the 18,076 theatres in the country in the 1945 season, ranging from Paramount's 13.74% to RKO's 3.01%. Warner theatres collected 6.19% (Appendix, p. 138, *infra*).

Similar divergences appear in that part of the cost of theatre operation represented by film rentals paid (Pltff.'s Appendix, p. 256).

2.) Differences in the percentages of the business of each separate company with independents negative collective treatment.

In such a conspiracy or combination as is claimed to justify collective treatment, there would be probability of some uniformity of pattern with respect to the volume of business done by each separate defendant with independent theatres.

There is no such uniformity of pattern here.

According to plaintiff's own exhibit 425 relating to the 1943/44 season, the percentage of total domestic film rentals received from independent theatres varied from Columbia's and Fox's 65% to Paramount's 46%.

Warner's percentage varied from year to year in every one of the last 16 seasons, ranging from a low of 52% to a high of 66% (Ex. W-4).

Excluding Warner intercompany payments to Warner, the percentage of Warner's total domestic film rentals received from independent theatres also varied from year to year in the last 16 seasons, ranging from approximately 65% to 77% (computed from Ex. W-4, reprinted in part on page 126, *infra*).

It is inconceivable that Warner would engage in a conspiracy or combination to destroy the independent theatres whose patronage is its life blood and to secure whose patronage it spends millions in distribution costs in competition with its alleged conspirators (p. 109, *infra*).

These percentages would, of course, be substantially increased by the effect of the decree below.

Contrast these facts with allegations in a complaint on a demurrer of a deliberate and intentional conspiracy to monopolize the taxicab manufacturing business through a monopoly of the taxicab business (86% in Chicago; 100% in Pittsburgh), the *Yellow Cab* case (332 U. S. 218), where a group of monopolist taxicab companies agreed not to buy their cabs from any manufacturer other than one manufacturer which was a party to the conspiracy.

We deal here with motion pictures which anyone may produce and market, which are copyrighted mainly to prevent piracy, not with any device to throttle production. Furthermore, we deal here with 5 theatre-owning distributors which sell and license their pictures to all exhibitors and have not entered into a conspiracy to license only each other and boycott all other exhibitors.

In the *Yellow Cab* case, this court, had to decide the validity of a demurrer against allegations of conspiracy in restraint of trade and to monopolize where a group of conspirators, each engaging in the taxicab business in some city, and most of the conspirators having a monopoly of the taxicab business in their respective cities, agreed that they would boycott the taxicab manufacturing industry and buy their taxicabs only from a party conspirator. There it was charged that the monopoly was acquired by the "dominating power" of a single family of companies, secured "by deliberate, calculated purchase for control" and not "by normal expansion". The conspiracy, it was alleged, had been effected by causing subsidiaries to secure a monopoly of cab operating licenses in these various cities and then purchasing their cabs only from the parent manufacturer.

Here, any exhibitor is eligible to purchase from the theatre-owning distributors, the other distributors and any prospective distributor, and the theatres of any single defendant buy not only from the theatre-owning distributors but from all other distributors. There is no monopolistic restraint on production or on theatre ownership: purchases or lack of purchases result from business considerations, not from necessity, as in the *Yellow Cab* case. And no single family of companies acquired its fraction of control of theatres (Warner 3%), as in the *Yellow Cab* case, "by calculated purchase for control", but "by normal expansion to meet the demands of a business growing as a result of superior and enterprising management" (Findings 26-30 [R. 3665], 152-154 [R. 3689], quoted on p. 8, *supra*).

3.) Differences in Warner's business as licensor and as licensee with each of the other separate companies (from year to year, nationally, and in the 92 large cities first run) negative collective treatment.

To sustain any inference that the business which Warner did with each of the defendants and which each of them did with Warner was an incident of a confederacy to monopolize exhibition, one would expect some showing that the defendants gave and took on the basis of a pattern from which a reasonable man could infer that they had impliedly agreed on monopolizing exhibition or that a concerted attempt to monopolize exhibition had been effectuated.

The evidence shows no discernible pattern of Warner's dealings with each of the other defendants either in terms of dollars or percentages in any year or from year to year in the last 16 years; no similarity in the length of the terms of licenses; and no uniformity in the business done both as distributor and exhibitor in the so-called first-run market in the 92 large cities.

(1)

The Court made the only finding conceivable under the evidence, that (Finding 141, R. 3688):

> "The dollars paid by Warner to each of the other defendants and by each of the other defendants to Warner show no uniformity of pattern from company to company from year to year."

Thus, just as an example, the Warner theatres were paying rentals for Loew's features of $4,574,114 in 1939/40, though the Loew's theatres were paying

rentals for Warner features of only $179,204 (Ex. W-6), or less than 4% of what the Warner theatres had paid Loew's in the same season.

Again, the rentals paid by Warner theatres for Paramount features ranged from $916,000 in 1930/31 to $3,477,000 in 1944/45, while the theatres affiliated with Paramount paid rentals for Warner features ranging from $2,600,000 in 1935/36 to $6,993,000 in 1944/45 (Ex. W-7).

In each of four seasons (1936/37, 1940/41, 1941/42, 1944/45), theatres affiliated with Paramount paid as rentals for Warner features *over $1,000,000 more* than in the season immediately preceding, although in not one of those same seasons did the Warner theatres pay Paramount rentals which even remotely approximated the tremendous increases which theatres affiliated with Paramount had paid Warner (Ex. W-7).

The same startling variations appear between each company in any particular season or between Warner and any other company in the last sixteen seasons (Appendix, pp. 128-134, *infra*).

(2)

In the exhibits and appendix, we have anticipated a possible claim that dollar comparisons might not tell the whole story, and for that reason have also made comparisons percentage-wise.

Thus, we have shown the striking divergences in the 1943/44 season (chosen by plaintiff as illustrative) in terms of what percentage of each of the

producer-exhibitors' total film distribution revenue was received from each of the other producer-exhibitors and what percentage of each of the producer-exhibitors' total payments for film was made to each of the other producer-exhibitors (pp. 142-143 of Appendix).

The variances are too striking to be ignored.

(3)

The Court also found marked variances in the business which Warner did with the three non-theatre owning defendants (R. 3688):

> "142. There were marked variances from year to year in the sums paid as rental by the theatres in which Warner had an interest to United Artists, Universal, and Columbia, the non-theatre owning defendants."

and the record shows the growth of these three non-theatre owning defendants at the expense of the five theatre owning defendants, as we shall show.

The possibility of a conspiracy or combination is negatived by the growth of and variances of Warner's business with each of these three non-theatre owning defendants.

Thus, the Warner theatres paid Universal as little as $742,352 in 1937, and as much as $2,518,722 in 1944, in which year Warner's payments to Universal were greater than its payments to Fox, RKO, United Artists or Columbia (Ex. W-3). Such figures refute

the intimation that theatre ownership results in "back-scratching".

Indeed, the three non-theatre owning defendants have grown from 1937 to 1944 at the expense of the theatre owning distributors. The percentage of the total rentals paid by Warner theatres to these three non-theatre owning defendants and to each of the theatre owning defendant distributors is (Ex. W-3):

	Universal United Artists Columbia	Paramount	Loew's	Fox	RKO	Warner
1937	13.94%	15.33%	19.88%	10.94%	9.19%	28.00%
1944	19.46%	12.93%	17.25%	10.08%	9.94%	26.50%

Thus, while the three non-theatre owning defendants substantially increased their business with Warner theatres, the Warner theatres did less business with Paramount, Loew's, and Fox; and Warner did about the same percentage with RKO (Finding 143, R. 3688).

(4)

Any inference of conspiracy between Warner and the other defendants is further dispelled by the undisputed fact that the Warner theatres made agreements to license features from the other defendants as distributors for different periods of time than the periods of time Warner as distributor made agreements to license its own features to theatres of other defendants.

The length of the terms of the licenses in any season which the Warner theatre department made for the features of each of the other distributors which also operated theatres and which the Warner distribu-

tion department made with each of the other theatre owning defendants show no uniformity of pattern (Appendix, pp. 140-141, *infra*). The appendix just mentioned shows how Warner used to license its features to the Loew's New York theatres and the reason why Warner shifted to the RKO New York theatres, based not on any business or lack of business of Loew's or RKO with Warner theatres, but on the increasingly small revenue which Warner received for its features from those Loew's theatres and the increasingly large revenue which Warner received for its features from those RKO theatres to which Warner shifted its product.

In some seasons, 1930/31 for example, Warner licensed the theatres affiliated with Paramount, though most of the Warner theatres did not exhibit Paramount pictures (Ex. W-15); whereas in other seasons, 1939/40 for example, Warner did not license many theatres affiliated with Paramount, though the Warner theatres exhibited Paramount pictures (Appendix, p. 141, *infra*).

Again, in the 1934/35 and 1936/37 seasons Warner theatres entered into contracts to exhibit Fox pictures for two or three years though the Fox theatres were contemporaneously agreeing to exhibit the Warner pictures for only one year (Appendix, pp. 140-141, *infra*).

(5)

To bolster its claim of a monopoly of exhibition, plaintiff carved out of the 18,076 theatres in this country a special category which it felt would more readily support its claim of an exhibition monopoly, *i. e.*, plaintiff first limited itself to the 92 cities with

populations of over 100,000, and then limited itself further to the first run exhibitions of the very best features in those cities.

The artificiality of such a category (the 92 largest cities with populations of over 100,000) appears from the fact that such a category excludes 40 metropolitan districts with populations of over 101,000 whose aggregate metropolitan district populations total over 7,661,000,—while it includes 47 cities which have aggregate metropolitan district populations of only 6,506,000. Wilkes-Barre, Pa., with 629,000 is for example thereby excluded, while Somerville, Mass., with 102,000 is included. The average of the population of these 40 metropolitan districts excluded is thus 191,525 as against 138,425 of the 47 cities included.*

The amended complaint alleges that defendants "established first-run outlets" by 1930 because they were "necessary to make the production of such features [at a cost of more than $250,000] profitable" (Par. 101, R. 3168). *A fortiori*, are such first run outlets "necessary" for profitable production today when such a feature costs over $1,300,000 to produce (Ex. W-10).

The facts, however, disprove any possibility of a Warner theatre monopoly in this limited market,

* In the 15 largest of these 40 excluded metropolitan districts, each with a population of over 170,000 and with average populations of over 300,000 (total populations of 4,525,000), Warner has theatres in only 3 such districts, the New Britain district (Conn.), the Schenectady-Troy district (N. Y.), and the Haverhill-Lawrence district (Mass.).

Similarly in the remaining 25 of these metropolitan districts, Warner has theatres in only five; Waterbury, Conn.; Johnstown, Pa.; Lancaster, Pa.; Charleston, W. Va.; and Kenosha, Wis.

These figures as to metropolitan districts are from the World Almanac.

and the lack of uniformity of Warner's business with each of the other defendants even in this limited market negatives any inference of such joint conduct as to constitute a conspiracy or combination.

Warner had no first-run theatres in approximately 70% of these 92 large cities, operating theatres in only 28 of the 92 cities.

In all these 28 cities (30%), Warner theatres have competition first run (Finding 147, R. 3688).*

Warner theatres did not exhibit first run, in equal or relative proportions, the features of the other distributor defendants in these 28 cities in the 1943/44 season, the season chosen by plaintiff as illustrative (Ex. 428).

Of the features of the other defendants which the Warner theatres exhibited first run, almost half were those of the non-theatre owning defendants. Thus in 20 cities, a Warner theatre exhibited the product of Universal, United Artists or Columbia, and in 18 others a Warner theatre exhibited one-half of the product of these non-theatre owning defendants.

Truly, a queer conspiracy or combination to monopolize first-run exhibition in the 92 cities where Warner operated first run in only 30% of said cities, where in the 30% of said cities in which it operated first-run theatres approximately half of the product of other defendants came from the non-theatre owning defendants (Universal, United Artists, and Columbia), and where the remainder of the product of the theatre-owning defendants was licensed in ap-

* Just before the trial, Warner had no competition first run in Philadelphia and Albany.

proximately equal proportions from Fox, Loew's, Paramount and RKO,* although the theatres of said four companies used strikingly different amounts of Warner product (Appendix, p. 126, *infra*).

Warner as distributor in the 1943/44 season licensed first run in these 92 cities (Ex. 428):

To no Loew's theatre in the 39 cities where Loew's operated (Finding 140, R. 3687).

To RKO as its regular account in only 4 RKO theatres and ½ of its product in 13 other RKO theatres.

To Fox as its regular account in only 4 Fox theatres and ½ its product in 6 other Fox theatres.

To Paramount as its regular account in 20 theatres affiliated with Paramount and ½ its product in 13 other theatres affiliated with Paramount.

The absence of pattern in the 92 cities first run is further evidenced by contrasting the film rentals received from "Princess O'Rourke" (the feature which plaintiff chose as representative) first run from theatres other than Warner's own in these 92 cities (calculated in Appendix, p. 135, *infra*).

The significance of these figures is this: Exclusive of Warner's intercompany business, Warner as distributor got almost as much from independents

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* All of the Fox product was exhibited in only 3 such Warner theatres, one-half of the Fox product in 5 others. All of the Loew's product was exhibited in only 5 such Warner theatres, one-half of the Loew's product in 5 others. All of the Paramount product was exhibited in only 6 such Warner theatres, one-half of the Paramount product in 7 others. And all of the RKO product was exhibited in only 6 Warner theatres, one-half of the RKO product in 13 others (Ex. 428, printed on page 299 of plaintiff's Appendix).

(28.6%) as it did from RKO, Fox and Loew's combined (38.3%) from first run in the 92 large cities. Warner's revenue from independent theatres was greater than its revenue from Fox, greater than its revenue from RKO, and of course greater than its absence of revenue from Loew's; and was but slightly less than its revenue from Paramount's affiliates (See Appendix, p. 135, *infra*). This was not a picture which gave the slightest basis for an inference of conspiracy.

Therefore the Court below found that the separate companies could not be collectively treated and that there was no monopolization (Finding 119, R. 3684; Finding 152, R. 3689).

4.) There is nothing which compels collective treatment of separate companies (or a finding of illegality) in the fact that a theatre-owning defendant licenses some of its features to a co-defendant and that said co-defendant licenses some of its own features to said defendant's theatres. "Cross" or "diagonal" licensing considered.

(a) *Such licensing has not the faintest resemblance to cross-licensing in patent pools.*

Plaintiff's catchwords to describe such licensing, namely "cross licensing" or "diagonal licensing", serve no function but to suggest to the unwary that such licensing has something in common with patent pools.

This is exactly what such licensing is not and in no wise resembles.

In the cases which condemn cross-licensing, there has usually been a "pool" of all patents, present and prospective, which "pool" controls from a single

common guiding source all licenses to manufacture similar goods, and through such licenses usually directly dictates the resale price of all such manufactured goods (see for example, the *Hartford-Empire* case, 323 U. S. 386, 406). In other cases cross-licensing is condemned where the parties to the cross-licensing agreement dictate the resale price of all such manufactured goods and agree to license no one other than the parties to the cross-licensing agreement.

Nothing is further from the facts at bar. Here, none of the five (or eight) defendants has "pooled" any of its features or entered into any agreements as to features which anyone (or any of them) may hereafter produce. And concession and evidence here show that anyone may (and that many others do) produce good features which have no trouble in getting distribution, *i. e.*, a market (p. 105, *infra*).

(b) *Such licensing as plaintiff labels as "cross-licensing" merely means that two theatre-owning distribution companies do business with each other.*

The simple business fact on which plaintiff seeks to cast opprobrium by the use of these catchwords is no more than this: defendant B exhibits in its theatres some of A's features and defendant A exhibits in its theatres some of B's features.

The perfect normality, and necessity, of such simple business intercourse between competitors in an industry will become even clearer as we proceed.

(c) *Why they must do business with each other.*

The public taste was such as to force exhibitors generally to require the product of several distributors. Accordingly, the court found that generally

theatres "could not be operated on the product of only one distributor" (Finding 151, R. 3689);

> "Except for a very limited number of theatres in the very largest cities, the 18,000 and more theatres in the United States exhibit the product of more than one distributor. Such theatres could not be operated on the product of only one distributor." (See also Finding 102, R. 3678).

(d) *Such business is not illegal and involves no illegal price-fixing.*

The Court below made no finding of fact or conclusion of law that such licensing was illegal, and recognized that an attack on such licensing was either no more than relief *pendente* divorcement (as plaintiffs argued at times below and in a brief to this Court) or a substitute remedy for divorcement itself.

The provisions of the decree below against any restriction as to minimum admission price (Decree, II, 1 [R. 3695]) and as to agreements as to a system of clearness (Decree, II, 2 [R. 3695]) make untenable even a colorable argument that such licensing will involve illegal price-fixing.

The price-fixing illegality enjoined below cannot be claimed to have anything to do with the simple business fact of doing business with a co-defendant wherever that happens to be necessary and desirable.

Since under the decree, each theatre is free to charge whatever admission price it chooses, no matter who owns the theatre or whose picture it is exhibiting, all that is left of plaintiff's claim of illegal price-

fixing in "cross" or "diagonal" licensing is simply this.

Any theatre which exhibits a feature necessarily has to—and will—fix its own admission price.

Plaintiff's brief on a motion to amend the consent decree so as to effect divestiture of all theatres correctly stated this obvious necessity (R. 3425):

> "The exhibitor, who possesses the theatre, determines the program of entertainment to be offered and collects the admission fees which make the exhibition of the film profitable, *would normally determine independently the price at which that entertainment should be made available to the public.*"

If a Loew's theatre in Boston exhibits Warner's "Gold Dust Twins", that Loew's theatre necessarily fixes its own admission price. Similarly, if a Warner theatre in Youngstown exhibits Loew's "Moonbeams", that Warner theatre necessarily fixes its own admission price.

The situation finds many analogies in business.

Thus, the Washington Baseball Club sends its "Senators" team to play in the Yankee Stadium in New York (where the New York Baseball Club fixes admission prices), while the New York Baseball Club sends its "Yankee" team to play in the Washington baseball park (where the Washington Baseball Club fixes admission prices).

Similarly, [before the publisher was authorized by statute to fix resale prices] Scribner's New York book-

shop fixed the retail resale price of Gunther's "Inside Europe" which it had bought from its Boston publisher Harpers, while Harpers' Boston bookshop fixed the retail resale price of Pyle's "Pacific War" which it had bought from its New York publisher Scribners.

No case has intimated that it is illegal for the buyer of a patented article to determine the resale price of that article merely because the seller has bought a *different* patented article from the buyer of said other article and will accordingly have to determine the resale price of that *different* article.

Hence, even if a license for limited exhibition of a copyrighted feature be assimilated to a sale for the purposes of the Sherman Law, it cannot be illegal for Loew's to fix the admission price at Loew's Arcadia Theatre in New York during the exhibition of Warner's "Yankee Doodle Dandy", merely because Warner's Stanley Theatre in Youngstown fixes its own admission price while it exhibits Loew's "Scarlet Lady".

There can be no price fixing under the Sherman Act where an exhibitor of motion pictures is under no restraint with regard to the admission price which that exhibitor charges. Where there is no restraint placed upon the exhibitor by the distributor, and where there is no restraint placed upon himself by the exhibitor in concert with his competitors, any price charged by that exhibitor is legal.

Therefore, where a distributor has placed no restraint upon the exhibitor in the latter's determination of an admission price, there can result no price fixing and hence no violation of the Sherman Act,

where at another time and place the exhibitor's affiliated distributor licenses the distributor's affiliated exhibitor.

The Act does not prohibit a man from licensing to X for limited exhibition a copyrighted motion picture because he may at some other time and place license from X for limited exhibition some other copyrighted motion picture from that same person.

This is *a fortiori* true, where, as here under the decree, each copyrighted feature must be offered to any putative licensee under competitive bidding, and no licensor may, directly or indirectly, prescribe the price which the successful licensee may charge for admission thereto.

Indeed, even before the decree below, such "diagonal" or "cross" licensing as existed could not have been *per se* a violation of the Act.

Where Warner operates a theatre on a particular run, Warner does not license its own features to another theatre on the same run, whether the theatre is owned by a defendant or an independent; and similarly no other defendant licenses its features to a Warner theatre on a particular run on which such other defendant operates a theatre.

This makes it mathematically impossible to have so-called "cross licensing" in direct competition on the same run.

This leaves the high-sounding phrase "cross" or "diagonal" licensing with no more content than this: that a Warner theatre may be licensed to exhibit a

feature of another defendant where such other defendant is not exhibiting said feature on the same run, and that some other defendant's theatre may be licensed to exhibit a Warner feature where Warner is not exhibiting said feature on the same run.

Thus, there is nothing remotely resembling illegal price-fixing by such business between defendants.

That the remedy sought of limiting defendants' theatres to their own films and those of non-theatre owning producers is no more than a means to compel self-amputation of theatres is obvious from the very first paragraph of plaintiff's Point III, which ingenuously states (p. 127):

> "This relief is also required independently of divorcement as a means of inducing a prompt divestiture of theatres in those towns where the defendants have a monopoly position."

Moreover, the reasons stated for a "one-year waiting period" before the prohibition takes effect reveal the certainty that such a prohibition would compel self-amputation. The waiting period is merely stated "to permit the defendants to make necessary adjustments" (p. 126):

(a) "through increased film production or"

(b) "through selling theatres in areas where they could not operate all of their theatres with their own product plus that of the three non-exhibitor defendants."

It cost Warner approximately $26,000,000 to produce 19 pictures in 1945. Unless it substantially cuts the quality of its product (and thereby decreases the

revenue-producing capacity of its pictures), it is obviously impossible for Warner sufficiently to increase its film production for profitable operation of its theatres, especially if it were unable to license such films to those theatres having the greater grossing potentiality.

And it is equally obvious that, except in rare instances, the Warner theatres could not operate profitably on the lesser quality pictures produced by those who own no theatres plus Warner's own pictures which, for lack of proper outlets (R. 3015), would also tend to become of inferior quality.

In a city where among a number of theatres, the Warner theatre is operating on first run, it will be unable to continue on its own product or the product of the "little three". Yet it cannot operate on second or even last run, because of the insufficient number of pictures available. The net result would be to deprive the public of an additional run in that city.

Or take a town which can support only two theatres, a Warner first run and a subsequent run. If the Warner theatre is enjoined from showing most of the best product, it must operate (if at all) on second run product of the "little three" and first run Warner product. The net result would be that the public would be deprived of seeing the product of the "big five" on a subsequent (and cheaper) run.

The Court below apprehended these and other consequences of this alternative method of amputation.

Thus, it pointed out on argument, for example, that in many of the smaller towns unable to support more than one theatre the result might be that the public would be deprived of seeing the product of four of the best companies unless Warner sold its theatre (R. 2886-7).

> "Judge Hand: Of course if Paramount had the only theatre in a place and that was all that was necessary to supply the demand, it would really prevent that place from having any of the shows, the good shows, of Warner, Loew's—any of these people.
>
> Mr. Wright: * * * There would be another theatre there in very short order * * *.
>
> Judge Hand: * * * On my hypothesis, * * * I said one theatre was enough for the town. * * * I am by no means clear that the mere inability to see some shows would build up another business if there wasn't material for it in the population to make it pay."

The Sherman Act was surely not designed to have the courts deprive a community of the privilege of seeing the best pictures.

F.

Assuming arguendo the possibility of collective treatment, there is no evidence of collective monopolization (or the possibility thereof under the decree below) sufficient to justify divestiture of theatres.

(a) *None of theatres.*

There can be no claim of a monopoly of the bricks, mortar and land which constitutes a theatre or of

operating theatres, because of the defendants' interest in only 3,137 of the 18,076 theatres in the country or 17.35% thereof (Finding 118, R. 3684), which may be reduced by another 1,292 by the divestiture provisions of the decree,—especially when set against the phenomenal growth of theatres from 13,386 in 1935 to 18,076 in 1945 (Finding 118, R. 3684; Finding 145, R. 3688).

4,690 new independent theatres do not spring up in 10 years if 3,137 of defendants' theatres have been monopolizing exhibition at the expense of the already operating 13,386 independent theatres.

(b) *None of theatre patronage.*

There can be no claim that defendants' theatres monopolized theatre patronage, because plaintiff offered no evidence of the box office receipts of the 14,939 independent theatres which reflect theatre patronage.

Though its amended complaint charged a theatre monopoly based on engrossing theatre patronage,* a claim inconsistent with the healthy and phenomenal growth of successfully operating independent theatres, plaintiff made no attempt to show what percentage of the annual patronage (or box office dollars paid as admissions) of all 18,076 theatres was collected by defendants' theatres.

The evidence was available to plaintiff in the form of the monthly amusement tax returns of each theatre, independent or affiliated. But the only evidence which

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* The amended complaint charged exhibition monopoly through "total theatre admissions" collected (Par. 130, R. 3180; par. 132, R. 3181), alleging for example that in 73 of the 92 largest cities the defendants received "a sub tantial majority of the total theatre admissions paid" (Par. [illegible]2, R. 3181).

the plaintiff offered was that furnished by the defendants as to their own theatres.

Defendants offered the best evidence available to them of the admissions collected by all the theatres, including the 14,578 independent theatres. This was an estimate of total admissions from the Film Daily Year Book (Ex. RKO-2).*

Defendants' theatres took in only 34.27% of the dollar total of all theatres in the country, based on this estimated total gross in the 1943/44 season and defendants' actual grosses for the same season (Appendix, p. 138, *infra*).

34% of the exhibition done in the country is no monopoly thereof.

(c) *None of film rentals paid.*

There is no other evidence from which a national monopoly of exhibition can be inferred, or on which to lay the basis for a claim of nation-wide divestiture.

The only other nation-wide evidence on which plaintiff relied was on that part of the cost of theatre operation reflected by film rentals paid.

Plaintiff showed no more than that defendants'

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* Though plaintiff questioned its accuracy (R. 1608), Exhibit RKO-2 was received as the only evidence of industry totals offered (R. 1609), since the Film Daily Year Book was "used constantly in your industry and regarded as a reliable book" (R. 1610). That its estimate of total admissions paid in the 1943/44 season is reasonably accurate appears from the note appended in the 1945 Year Book (p. 47):

> "Note: Annual U. S. theatre gross was formerly based on a Treasury Department estimate that 90 percent of admission tax collections were from theatres. Recently, however, the Treasury reduced that estimate to 87 per cent and the above annual grosses are based on that estimate with allowances for taxes collected on passes and for 'breakage'".

theatres paid to all eight defendants 45.2% of the total rentals thus paid by all theatres (Findings 126 and 128; R. 3685).

To pay 45% of the film rentals paid in the country does not show a monopoly of the theatre business thereof.

Moreover, that 45% has no relevance to prove a monopoly of the theatre business, because it represents nothing more than a part of the cost of operation of defendants' theatres as against a similar partial cost of operation of independent theatres. Since many of defendants' theatres are among the largest and most expensive in the country, with huge overhead charges, operated in part as "show-cases" for the promotion and advertisement of new features, it is understandable if they pay a larger film rental than many independent theatres.

Plaintiff claimed that film rentals reflected admissions collected at the box office, since films are often licensed on a percentage of their gross receipts.

Though true of most of defendants' first run theatres in the very largest cities, it is definitely false when it is sought to be applied to most of the theatres in this country. Most of them license film on a flat fee, presumably because it is more profitable for them to pay a flat rental. Thus, of the 14,090 bookings of Princess O'Rourke, in 12,926 theatres the average film rental per booking was $78 (Ex. W-12), a return so small as not to have been based on a percentage of their gross.

The independent theatres paid a dollar film rental which consisted of a much smaller percentage of their

box office receipts than the percentage paid by the theatres affiliated with defendants.

Whereas the affiliated theatres paid 27.33% of their theatre admissions to the eight distributor-defendants as film rental for their features, independent theatres paid only 15.51% of their theatre admissions to the eight distributor-defendants as film rental for their features (Appendix, p. 138, *infra*).

Monopoly of theatre operation is not proved by showing what percentage of a part of the cost of operating theatres was paid by defendants' theatres, especially when that percentage is only 45%.

Nor can any claim of nation-wide exclusion be validly based on an averaging of the film rentals received by defendants. Even under such collective treatment, the defendants in the 1943/44 season in the aggregate received 54.8% of their total domestic film revenue from independents (Finding 128, R. 3686).

(d) *None in the 92 cities.*

The evidence adduced as to the first run theatres in the 92 cities with populations of over 100,000 failed to establish a collective monopoly and did not warrant total divestiture of all defendants' theatres in this country.

There is no evidence of what percentage of total theatre patronage was represented by defendants' first run theatres in these 92 cities, because plaintiff offered no evidence of the box office receipts either (a) of all the 18,076 theatres in the country, (b) of any of the 13,286 independent theatres, or (c) of any or all of the defendants' first run theatres in these 92 cities. [Indeed, there is not even evidence of box office re-

ceipts of theatres of independents and defendants first run in these 92 cities.]

Assuming arguendo only that film rentals paid are some evidence of patronage, we recall no computation by plaintiff which discloses the relation of the film rentals paid by said defendants' theatres to those paid by all similar theatres.

Assuming further, arguendo on arguendo, that the Warner statistics as to its most booked picture in 1943/44, "Princess O'Rourke", would reflect the situation as to all five defendants for all their features in said season, the first run market in these 92 cities is only 27.4% of the total national market, and defendants' theatres' portion thereof only 60.8%, so that defendants' first run theatres in said 92 cities is only 16.6% of the national market, based on film rentals paid.* (Computed from Warner's answers to 1945 interrogatories.)

(e) *No propriety in segregating these 92 cities.*

But there is no factual or legal justification for segretating first run theatres in said 92 cities from the national market of this industry.

* There is no finding, nor evidence to support a finding, that operation of first run theatres in most of the 92 cities carried with it monopolization of any additional theatre patronage. Indeed, the percentage of actual attendance at these first run theatres necessarily included such control of attendance as might be implied by Findings 71-72 (R. 3672) relating to the system of runs, clearances, and fixed admission prices. And whatever divergence of attendance to first run there may have been will not continue with the injunction against continuance of the system.

It hardly needs argument to establish that the controlling factor in attendance as between runs is determined by admission pric[illegible]ctually charged (not theoretical minimums) and the p[illegible], convenience, and pleasure of the prospective theatregoer.

The operation by each defendant of a first run theatre in a sufficient number of large cities is a business necessity if its features are to be adequately promoted and advertised for the benefit of the national market (Findings 122-123, R. 3685; see also R. 681, 1693). No one defendant, however, operates such show-cases in more than 48 of the 92 cities (Paramount). Other defendants operate in a lesser number of cities ranging from RKO's 18 (RKO Ex. 1) to Loew's 36. In many of these cities more than one defendant owns or operates a theatre primarily used as show-case, that is, for the proper advertising and promotion of its own pictures. The presence of these show-case theatres in these cities of the theatre-owning defendants in competition with one another is the best evidence of their intensive competition in order to properly promote and advertise their pictures for the nation-wide market.

The operation of first run theatres in some of these 92 cities is, therefore, a business necessity.

If the features of each of them are to be adequately promoted and advertised for the benefit of the national market of each of the defendants, including the 14,578 independent theatres, operation of first run theatres by each of the defendants in some of these 92 cities is a business necessity to each of them. There is no contrary evidence in the record.

Without such adequate promotion and advertisement first run in these centers of population, the 14,578 independent theatres could not operate.

Where business necessity requires "show-case" theatres for adequate development of the entire market, ownership of such theatres is not monopolization,—

especially when they represent collectively at most 1/6th of the entire national market.

It cannot be that the very instrument which creates the larger national market can be segregated from the national market in order to be condemned as such monopolization as requires destruction.

Undoubtedly this was one of the many factual considerations which impelled the statutory court to find as a fact that (R. 3690):

> "155. Total divestiture would be injurious to the corporations concerned and would be damaging to the public."

Plaintiff below and here asks that defendants be divested of all their theatres throughout the nation because of alleged monopolization of that small segment of theatres which have the function of making pictures more valuable for their producers and for all theatres throughout the nation (and plaintiff declined to request any relief as to any specific first run theatre in any one or more of said 92 cities [R. 2769, 2777-8, quoted in footnote on page 63, *supra*]).

There is no rhyme or reason for Warner to be deprived of all of its theatres, wherever situated and whatever their run, because other defendants like Warner felt the business necessity of operating theatres first run in the largest 92 cities,—especially when their number may be reduced substantially as the probable result of the provisions below for sale of partial ownerships and when the result of the new marketing provisions will enable any independent theatres to bid for first run features in such cities.

POINT IV.

The Court properly exercised its discretion in refusing to decree relief inappropriate under the circumstances.

Nationwide drastic relief of divestiture would have been improper where, as here,—

1.) The Court found (R. 3670):

> "59. There exists active competition among the defendants and others in the production of motion pictures.
>
> "60. None of the defendants has monopolized or attempted to monopolize or contracted or combined or conspired to monopolize or to restrain trade or commerce in any part of the business of producing motion pictures."

supported by undisputed testimony (for example, Joy, R. 1521-1552) and by concessions of plaintiff's counsel:

> "Judge Hand: Why don't you answer the query? As a producer there is no case against it?
>
> Mr. Wright: That is correct, yes, sir. * * *
>
> Judge Bright: Well then your case is aimed at distribution and exhibition in combination?
>
> Mr. Wright: Quite so" (R. 388).
>
> "Judge Goddard: Do you claim there is a monopoly in production? I don't think I understand your position.

Mr. Wright: I don't think we do.
Judge Goddard: I beg your pardon?
Mr. Wright: No, we do not" (R. 1952).

2.) There was express admission that any feature suitable for first-run exhibition was assured of first-run exhibition in suitable theatres, *i. e.,* secured adequate distribution:

"Mr. Wright: * * * I would concede that the evidence you have before you does not show that any particular independent producer who wanted to make a picture could not get it released by one of these distributors.
Judge Bright: Or has not?
Mr. Wright: Or has not, yes" (R. 387).
"Judge Bright: If I understand you, if I wanted to produce I would hesitate to do it, anticipating that I might not get a market for my films; is that the idea?
Mr. Wright: I think you have a reasonable assurance that if you are a competent producer and can make a good picture, you can get one of these companies to release that film for you" (R. 388).
"Mr. Wright: Insofar as the production end of the business goes, I suppose it is perfectly clear that anybody who has talent and who can make a successful picture is in intense demand, and that all of the people who own theatres are anxious to have those people make pictures and get their pictures distributed. In other words, what Mr. Raftery says about 'there isn't anything wrong with the industry that more good pictures would not cure' is probably largely true in the sense

> that * * * these defendants * * * want to do whatever they can to have as many good pictures made as possible because, in exploiting them through their theatres, they profit from good pictures, no matter who makes them" (R. 1949).

Indeed, the rapid growth of non-defendant producers like P. R. C., Republic and Monogram (R. 910-911), of the non-theatre owning defendants like Universal (p. 83, *supra;* R. 1263-65, 1350-52), and since the trial itself of Companies like Eagle Lion controlled by J. Arthur Rank made the concession inevitable.†

3.) It was undisputed that independent theatres had increased by well over 4,000 in the last ten years (Finding 145, R. 3688; R. 2797; Ex. L-12), an increase of over 68%, that independent circuits had also increased (R. 738), and that Warner, Loew's and RKO had not expanded their theatre holdings since 1935 (Findings 22, 31-32, 120, 118; R. 3664, 3684).

4.) There was no evidence of abuse of power such as has occasionally been found to have been

† Since the trial, Selznick, which formerly distributed through a defendant, has organized its own distribution company, The Selznick Releasing Organization, represented by an *amicus curiae*.

For ten years before the trial the number of independent producers and productions had been increasing (R. 639, 1263). A list of successful features produced independently during the years prior to the trial is in Columbia's Exhibit C-4. At the time of the trial there were about 40 independent producers in Hollywood alone (R. 639-641). Those who do not have their own studios make extensive use of the studio facilities, equipment and talent of the defendants and others, which are available for reasonable rentals (R. 637-39, 651, 1529-34, 1801-03, 1261-62). Thus independent producers have been and are able to compete successfully without high overhead either in fixed investments or talent contracts.

exercised by theatre circuits interested solely in their exhibition revenue, as was found in the *Shine* and *Crescent* cases. On the contrary, the theatre-owning defendants consented to a decree which made arbitrable any clearance in favor of any theatres, including their own, and offered below to consent to broaden such right to arbitrate to runs and to certain aspects of competitive bidding. That offer we repeat here.

5.) There were affirmative findings that none of the defendants was organized or maintained for the purpose of achieving a national monopoly (66 F. Supp. at 354 [R. 3553]; Findings 152-154, R. 3689-3690).

6.) There was no evidence or claim that the public had to pay more for what it received from an affiliated theatre than from a comparable independent theatre.

7.) Each member of the public could see each feature at whatever admission price he preferred and, subject to the number of theatres in any given locality, under whatever surroundings he preferred. This was primarily due to the system of run and clearance which tended to afford the exhibitor a wide selection of the film rental he chose to pay* and accordingly offered the public a wide selection of

* The wide range of film rentals is sufficiently indicated in Exhibit W-12 which shows that, of Warner's most popular feature in 1943-1944, the average film rental per booking was $78 in 12,926 theatres out of the total bookings of 14,090. The exact sum paid by each of these 14,090 theatres is set forth in Warner's answers to 1945 interrogatories numbered 2 and 6 to 11 inclusive.

admission prices (Findings 76-77, R. 3673)—sometimes even on the same run.*

8.) There was no price-fixing or uniformity of price except as to minimum admission prices, which practice has been enjoined by the decree below. There was, however, no evidence that the minimum admission prices sometimes specified in Warner licenses did in fact hamper any exhibitor in his free choice of the admission price to be charged for any Warner feature.**

* The range of admission prices sometimes overlaps on successive runs so that a first and second, or second and third run theatre will charge similar admission prices (Exs. W-22, 126), in spite of stipulations as to different minimum admission prices. A striking, though somewhat unusual example is the fourth run independent little Plaza Theatre in Manhattan, which charges more than most of the big neighborhood affiliated second run theatres.

** Exhibit W-22 shows the actual admission prices charged and the minimum admission prices if stipulated in Warner licenses for "Princess O'Rourke" in every one of the 14,090 theatres which played that Warner feature.

Appendices H and I show the same thing for the first run theatres in the 92 largest cities. They show:

In 75 of the 92 cities no minimum was inserted in the license, so that there is no basis for comparison.

In the remaining 17 cities ranging in size from Chicago (pop. 3,396,808) to Tampa (pop. 108,391), where a comparison is possible because a minimum was inserted in the license, the facts are these:

In 8, more than the minimum was charged;
In 6, less than the minimum was charged;
In 3, the minimum was charged.

12 of these cities involved independent exhibitors:

In 2 of these 12, the exhibitor charged the minimum specified;

In 3 of these 12, the exhibitor charged less than the minimum specified;

In 7 of these 12, the exhibitor charged more than the minimum specified, to wit:

27 cents more in Fall River and New Bedford
25 cents more in Buffalo
22 cents more in Providence
21 cents more in Cambridge
15 cents more in Dayton.

9.) There was express admission that the defendants compete with each other in their efforts to license their features to the greatest number of theatres (Wright, R. 1062). It was undisputed that the defendants (including Warner) maintain enormous sales organizations divided into exchanges where they spend millions competitively seeking the patronage of unaffiliated and affiliated theatres (R. 414, 437, 444, 660-670, 1257, 1410, 1415-16, 1452-53, 1456, 1467-8, 1504, 1685, 1729). There was no compulsion, however, for any theatre to license any Warner feature. The number of theatres booked varied with each feature. Thus, in the 1943-44 season, "Princess O'Rourke" had the highest number of Warner bookings, 14,090, and "Adventures in Iraq" the smallest, 3,933. Eight others had over 12,000, five over 10,000 and four over 7,000 bookings (Ex. 125). The film rentals received from licensing these 19 features ranged from $132,367 for "Adventures in Iraq" to a high of $2,806,909 for "Destination Tokyo". Though "Princess O'Rourke" had the largest number of bookings, six other features yielded more film rentals. The variations which often occur between revenue and bookings find illustration in "Mrs. Skiffington" with only 10,371 bookings yielding $2,286,121 in film rentals and "Uncertain Glory" with 11,651 bookings yielding only $1,274,682 (Ex. 125). There was therefore (a) competition in the prices for which Warner features are licensed, (b) no compulsion on the 18,076 theatres to pay uniform prices for each of Warner's features and (c) no regularity of pattern in their pricing.

10.) There was no proof of inordinate profits by any defendant and there was affirmative proof that Warner's integrated business as a whole had, over the last sixteen years, earned an annual average of only 1.25% of its assets (Ex. W-20), only 2.74% of its net worth (Ex. W-19), and only 2.19% of its total income (Ex. W-18).

11.) There was evidence that divestiture of theatres might seriously jeopardize, under existing conditions of the foreign markets, the ability of the defendants to maintain their present standard of production, with consequent damage to the public (Findings 155, 158, 159, R. 3690; and R. 1560 quoted on page 121, *infra*).

Amputation of theatres was found "damaging to the public" (Finding 155, R. 3690) in an industry where there was active competition in production; assistance rendered to independent producers of one or more pictures; assurance of adequate distribution and exhibition of the pictures so produced by independents; rapid growth of independent and non-theatre owning producers; rapid growth of independent theatres; no intent to achieve either national or local monopolies; no evidence that the public has to pay more for what it receives from a defendant than from an independent (be he producer, distributor, or exhibitor); and an industry structure which permits each member of the public to see each feature produced at whatever admission price he prefers and, subject to the number of theatres in any given locality, under whatever surroundings he prefers.

Other considerations which may have influenced this finding, and the consequent reluctance to disturb the structure of an industry further than to eliminate such existing restraints as were found illegal, may briefly be mentioned.

Since "The basic requisite for successful theatre operation [by a suitable theatre with suitable management] is access to good pictures" (Pltff.'s Br., p. 121), and since such good pictures in adequate quantities for successful theatre operation have in the past primarily flowed from the theatre-owning defendants who could better afford the risks inherent in such large-scale production because of revenue from theatre operation and foreign distribution, amputation of these theatres at a time when substantial revenue from foreign distribution has been cut off (p. 121, *infra*) may well involve serious "risk of injury to the public interest" (p. 118, *infra*).

Moreover, the Court may not have been unmindful of the necessity for adequate advertising in defendants' "showcase" theatres if both the producers and the 15,000 odd other theatres are to receive adequate returns on their investments (p. 102, *supra*).

We do not suggest that such considerations affect the primary questions of whether and to what extent the Act has been transgressed.

We do suggest that they cannot be ignored in deciding whether discretion as to the pragmatic form of relief decreed has been so abused as to compel a reversal in the form of amputation.

The Court below correctly exercised its discretion as to the form of relief (cf. *United States* v. *National Lead Co.,* 332 U. S. 319, hereinafter quoted; and *Hartford-Empire Co.* v. *United States,* 324 U. S. at 575) by adapting that relief to remedy alleged evils in the *distribution* of features where it was claimed that there was insufficient competition and restraints, declining to extend relief to the highly competitive field of exhibition further than to order divestiture wherever there were restraints on competition by pooling or joint ownership of otherwise competing theatres, and retaining jurisdiction to order different or further relief should the circumstances warrant in the light of actual performance under its present decree.

No case or rule of law requires this exercise of judgment to be upset.

(1) In the *Oil,* the *Tobacco* and the *Pullman* cases, the defendants were solitary monopolists.

No such claim is even suggested here. Indeed, it is conceded that the Warner corporations, as an entity, do not monopolize the industry. The make-weight suggestion that there should be a decree divorcing the Warner corporations from one another just has no point in the evidence either with respect to the evils complained of or the attempt to remedy them.

(2) In the *Oil* (221 U. S. 1), *Tobacco* (221 U. S. 106), and *Pullman* (330 U. S. 806) cases, the Court found that because a solitary monopolist had violated both Sections 1 and 2, dissolution was an appropriate remedy. There the solitary monopolist was found to have acquired and maintained his position as a solitary monopolist through persistent preda-

tory practices. It was thought necessary, therefore, to dissolve the solitary monopolist. Here, there is no evidence of any degree of control over exhibition that any defendant, either singly or collectively, has secured through predatory practices. Indeed, the Court below pointed out (66 F. Supp. at 354 [R. 3553]):

> "* * * there is no substantial proof that any of the corporate defendants was organized or has been maintained for the purpose of achieving a national monopoly * * *." (See also Findings 152-154, R. 3689.)

(3) In the *Oil* and *Tobacco* cases where dissolution was thought necessary, the Court dissolved the *solitary monopolist into separate integrated companies so that each of the resulting integrated companies would be in a position to compete with each other as integrated companies.* Here, the Government seeks to amputate each of five separate integrated companies by making each of them a non-integrated company.

What plaintiff demands is, not the dissolution of the monopoly, but amputation and an interdict that five of the present competitors shall not compete in exhibition. *Under the guise of removing certain minor restraints on competition, the Court is urged to enjoin competition by and between all integrated units in the industry.*

The two *Reading* cases are even less in point (226 U. S. 324 and 253 U. S. 26).

There, in the first case the Court left intact the holding company's control over six otherwise inte-

grated companies, merely enjoining their contractual agreement with each other to maintain anthracite prices at the mine of not less than 65% of the average tidewater prices.

Eight years later, when it was found that their collective control had remained unchanged despite said injunction, the Court dissolved the holding company and separated the railroad companies from the mining companies, relying in part on the then recently enacted statute prohibiting railroads to own mines.

Apposite are the words of Mr. Justice Burton in the recent case of *United States* v. *National Lead Co.*, 332 U. S. 319:

> "* * * The findings show vigorous and apparently profitable competition on the part of each of the four producers, including an intimation that the smaller companies are gaining ground rather than losing it.* * * * The competition between National Lead and du Pont has been carried into this Court.** * * * (pp. 347-348).
>
> "Assuming, as is justified, that violation of the Sherman Act in this case has consisted primarily of the misuse of patent rights placing restraint upon interstate and foreign commerce, that conduct is not before this Court for punishment. It is brought before this Court in order

* Compare the phenomenal growth of independent theatres in the last ten years and of the non-theatre owning defendants and other producers and distributors, heretofore noted (p. 106, *supra*).

** Compare the divergent attitudes of Universal, United Artists, Columbia on the one hand, and the theatre-owning defendants on the other. Note the divergent views on competitive bidding among the theatre-owning defendants themselves.

to secure an order for its immediate discontinuance and for its future prevention. That will be accomplished largely through the strict prohibition of further performance of the provisions of the unlawful agreements" (p. 348).

"* * * Finally, the District Court, under * * * the decree, will retain sufficient jurisdiction to enable it to vacate or modify its orders * * * if it finds such action to be necessary or appropriate* (p. 351).

* * * *

"We believe there is neither precedent nor good reason for such a requirement [*i. e.* divestiture of one of defendants' two titanium plants]. The violation of the Sherman Act is found in these cases in the patent pooling and in the related agreements restraining interstate and foreign commerce. There is neither allegation in the complaint nor finding of fact by the District Court that the physical properties of either National Lead or DuPont have been acquired or used in a manner violative of the Sherman Act, except as such acquisition or use may have been incidental or related to the agreements above mentioned.† The cancellation of such agreements and the injunction against the performance of them by the appellant companies eliminate them.‡ * * * the decree goes further. It requires National Lead and its subsidiary, Titan Inc., to present, within one year, a plan for divesting themselves of their stockholdings and

* Compare VIII of the decree below (R. 3701).

† Compare Findings 152-154 (R. 3689) quoted on page 8, *supra* and 66 F. Supp. at 354 (R. 3553), quoted on page 73, *supra*.

‡ Compare II, 1-9 and III, 1-4, 7 of the decree below (R. 3695).

other financial interests in certain foreign corporations, or for the purchase of the entire stockholdings and other financial interests * * * in such corporations or any of them.†† Such a plan * * * will go as far toward divestiture as the findings of fact indicate should be necessary to make the decree effective.‡

"There is no finding of fact, and apparently no evidence, showing that the respective principal titanium plants of National Lead or du Pont were acquired in violation of law,** that they ever were separately owned or operated,† or that they are adapted to such operation.* Presumably, the requested divestiture would be for the purpose of providing four instead of two inde-

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†† Compare Decree, III, 2-4 and especially III, 5 and 6 (R. 3698).

‡ Compare Findings 152-156 (R. 3689) and the Opinion below (66 F. Supp. at 357 [R. 3559]):

> "The relief proposed we believe should suffice, while total divestiture would be damaging to the public as well as to the defendants and not accomplish any useful purpose at the present time."

** The holding here is that the theatres were not acquired or maintained for the purpose of a national monopoly (66 F. Supp. at 354 [R. 3553]; see also Findings 152-154 [R. 3689]).

† Compare the way theatres have been operated, when controlled by a circuit whose *sole* interest is in theatre operation (*United States* v. *Crescent Amusement Co.*, 323 U. S. 173). As the Opinion below noted (66 F. Supp. at 355 [R. 3555]:

> "These practices, if employed in the future, in favor of powerful independents would effect all of the undesirable results that have existed when the five major defendants and their subsidiaries have owned or controlled numerous theatres in which the defendants' pictures have been exhibited. That such would be the case seems amply demonstrated by the decisions where powerful independent circuits were involved [citing the *Crescent* and *Interstate* cases]."

* Compare Finding 155 (R. 3690) and 66 F. Supp. at 353 (R. 3551), and the evidence as to the necessity of theatres for adequate production (p. 102, *supra*).

pendent major competing plants in the titanium pigment industry. However, there is no showing whether or not the two [existing] licensees * * * may not be able to develop, under the decree, even more substantial competition against National Lead and du Pont than would new concerns operating the divested plants.* No comparable precedents have been presented.

"There is no showing that four major competing units would be preferable to two, or, including Zirconium and Virginia Chemical, that six would be better than four. Likewise, there is no showing of the necessity for this divestiture of plants or of its practicality and fairness. The findings of fact have shown vigorous and effective competition between National Lead and du Pont in this field. * * * Such competition suggests that the District Court could do well to remove unlawful handicaps from it but demonstrates no sufficient basis for weakening its force by divesting such of the two largest competitors of one of its principal plants. *It is not for the courts to realign and redirect effective and lawful competition where it already exists and needs only to be released from restraints that violate the antitrust laws. To separate the operating units of going concerns without more supporting evidence than has been presented here to establish either the need for, or the feasibility of, such separation would amount to an abuse of discretion.*"

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* "We think that the opportunity of independents to compete under the bidding system for pictures and runs renders such a harsh remedy as complete divestiture unnecessary, at least until the efficiency of that system has been tried and found wanting" (66 F. Supp. at 353 [R. 3551]).

The harsh and drastic relief of divorcement is additionally inappropriate here where the consequences to the industry and to the public might be disastrous.

Illuminating in the instant case are the concluding words of the Court in *United States* v. *U. S. Steel Corp.*, 251 U. S. 417, 457;

> "In conclusion we are unable to see that the public interest will be served by yielding to the contention of the Government respecting the dissolution of the company or the separation from it of some of its subsidiaries; and we do see in a contrary conclusion *a risk of injury to the public interest*, including a material disturbance of, and, it may be *serious detriment to the foreign trade*. And in submission to the policy of the law and its fortifying prohibitions the public interest is of paramount regard." (Italics supplied.)

The "serious detriment to the foreign trade" is apparent here where the total domestic film revenue barely covers costs before distribution expense (Exs. W-11, W-13, R. 444), where there is no evidence that any profits have been earned by any defendant solely from production and distribution in the domestic market, and where there is affirmative proof that Warner over most of eight years would have operated at a loss but for its foreign distribution and domestic exhibition (Ex. W-13).

The usefulness of our first run theatres both as "show cases" and to subsequent run exhibitors in advertising the pictures to the public is elaborately described in other briefs and need not be repeated here.

Apposite are the words used by the statutory court in *United States v. Standard Oil Company*, 47 F. 2d 288, 309, in approving a proposed merger of the *Standard Oil Company of New York* and the *Vacuum Oil Company* as not violative of the decree of dissolution entered in the *Standard Oil* case, 221 U. S. 1:

"The industry, as a whole, is thoroughly into the stage of integrated companies, which means that such a company owns or controls crude production, pipe lines, and tank cars, refineries to work up the crude and marketing organizations to sell the refined products—with special emphasis, as to marketing, upon the operation or control of retail automobile outlets. The superior business position of such an integrated company is evident. Among these advantages are the *ability to make up temporary losses in one stage of the business by profits in another;* to be independent of outside supplies and operations; to *have a consistently sustained business; and to secure the ultimate profits of the entire business from the raw production all the way to the retail of the finished products.*" (Italics supplied.)

The serious "risk of injury to the public interest", movie-goer and non-integrated theatre owner alike, from speculative experiments in disintegration was nowhere better stated than by counsel for the plaintiff before Judge Goddard on the hearing at the time of the adoption of the Consent Decree:

"I think it fair to say that both the defendants and the Government honestly believe that [the consent decree] is infinitely to be preferred to

years of litigation with the possibility at the end of the *chaos that might result from divorcement*." (Italics supplied.)

Indeed, one of the consequences of divorcement which both the Court below and said plaintiff's counsel may have preferred to avoid is the increase of predatory independent circuits interested solely in theatre aggrandisement,—like the foundation of the Shine circuit after 1929 when Universal disposed of its theatres, as alleged in the amended complaint herein (Par. 78, R. 3163).

This industry brought into this country millions of dollars annually for which it exported nothing more than a few thousand feet of celluloid of nominal cost (Ex. W-12). Approximately 30% of Warner's total film rentals came from abroad (Ex. W-5). This foreign business resulted solely from the high quality of American pictures which in turn rests on mounting production costs (Ex. W-10). Yet the cold statistics indicate that domestic film rentals without profits from theatre operation and foreign distributions do not cover negative costs of the magnitude of a company like Warner (Exs. W-11, W-13).

Any "chaos that might result from divorcement" will have repercussions not only in enhanced film rentals for the small independent exhibitor (Ex. W-12) but a direct effect upon the foreign business which has so successfully carried and popularized the American way of life to the farthest confines of the globe.

Indeed, if defendants are forbidden to compete with independent circuits and booking combines

(R. 738 *et seq.*), the effect upon their film revenue might be disastrous, since defendants would be left at the mercy of predatory exhibition combines interested solely in revenue from theatre operation.

The present difficulties of the foreign business and the interdependence of domestic and foreign film revenue and profit from theatre operations were succinctly summarized by Mr. H. M. Warner (R. 1560):

> "In the past our foreign business has been exceedingly profitable, but with the cessation of the war our foreign markets are being severely restricted. Country after country is adopting quota systems and state monopolies in order to promote their own motion picture production. During the war England, our chief foreign market, was unable to produce its own pictures. Hence we were able to derive a very substantial revenue from England. At one time during the war England threatened (and did for a time) block our funds derived from exhibition in England and was only dissuaded from doing so by being convinced that the American companies could not continue to supply England with quality productions if their England revenue were shut off altogether. With the cessation of hostilities, England is launching on production on a large scale and the dangers of a quota system or restrictive measures in some other form are pressing.* The more our foreign revenues decrease, the more vital it will be for us to have the profits from our theatre operations in order to maintain our present standard of production.

* Since the trial, England has so heavily taxed American pictures as to make their distribution in England unprofitable.

In this industry the public may see within a comparatively short time every picture at whatever price it prefers to pay and every exhibitor we license may exhibit the same pictures in its theatre at whatever price it prefers to charge depending upon its policy of operation and the price level to which it caters.

Most of the seventeen thousand-odd theatres in the United States are able to license the same product within a comparatively short space of time at rentals below the cost of the positive print which they project on to their screens. * * *

This structure of the industry will, in my opinion, be jeopardized by the divorcement of theatres from production, with hardship not only to our company but to the attendance of many millions who go to the motion picture theatres in the United States, and the approximately 15,000 independent theatres in this country."

POINT V.

II, 4 of the Decree, properly construed, is not objectionable.

II, 8 (c) of the Decree provides that (R. 3697):

> "* * * the distributor shall grant such license upon the run bid for to the highest responsible bidder, having a theatre of a size, location and equipment *adequate to yield a reasonable return to the licensor.*"

It therefore contemplates that, in granting a license, the licensor shall take into consideration the "reasonable return to the licensor".

It is in the light of this express recognition of the licensor's right to a reasonable return that II, 4 of the Decree must be construed, which enjoins any clearance "in excess of what is reasonably necessary to protect the licensee in the run granted" (R. 3696).

We construe this to mean that, once the licensor has been assured "a reasonable return", any clearance is enjoined which is "in excess of what is reasonably necessary to protect the licensee in the run granted".

If, however, II, 4 of the Decree is to be construed as enjoining the licensor from considering its own "fair return" in granting clearance, it should be modified as inconsistent with II, 8 (c) of the Decree and as depriving the owner of the copyright of a fair return on his copyright.

The second sentence of II, 4 of the Decree provides (R. 3696):

> "Whenever any clearance provision is attacked as not legal under the provisions of this decree,

the burden shall be upon the distributor to sustain the legality thereof."

We construe this as shifting to the distributor the burden of going forward with the evidence as to the reasonableness of the clearance granted,—not with affecting the nature of the legality or illegality of the clearance which is elsewhere defined in the Decree, Decision, and Opinion.

So construed, it is unobjectionable.

If, however, it be construed as making illegal a clearance otherwise legal, it should be eliminated as a gross departure from all recognized concepts of judicial administration.

CONCLUSION.

On appeal No. 79 the judgment appealed from should be affirmed.

On appeal No. 80 the judgment appealed from should be modified as herein indicated.

Appeals from orders denying intervention should be dismissed or affirmed.

Respectfully submitted,

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